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Janalee Tobias and Judy Feld v. Anderson Development, CO, LC : Brief of Appellant

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Dale F. Gardiner; Douglas J. Parry; Jennie B. Garner; Parry Anderson & Gardiner; Attorneys for Appellants.

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IN THE UTAH SUPREME COURT

JANALEE TOBIAS, JUDY FELD,	:	
Defendants/ Appellants,	:	Consolidated Appeal No. 20030469-SC
vs.	:	
ANDERSON DEVELOPMENT CO., L.C.	:	Trial Court No. 980902813
Plaintiff/ Appellee.	:	

BRIEF OF APPELLANTS

ON A CONSOLIDATED APPEAL FROM AN INTERLOCUTORY PARTIAL SUMMARY JUDGMENT AND PARTIAL RULE 12(b)(6) DISMISSAL ORDER AND FROM AN INTERLOCUTORY ORDER DENYING A MOTION FOR SUMMARY JUDGMENT IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, HONORABLE DOUGLAS CORNABY

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Appellants Janalee S. Tobias and Judy Feld (hereinafter "Mrs. Tobias and Mrs. Feld") respectfully submit this Brief of the Appellants. The Appellee, Anderson Development, Company, L.C., is hereinafter referred to as the "Developer." At stake in this appeal is whether SLAPP suits[1] will be allowed to threaten and punish core First Amendment expression.[2]

JURISDICTIONAL STATEMENT

The Utah Supreme Court has jurisdiction to hear this consolidated appeal of the two interlocutory orders at issue under[3] Utah Code Annotated § 78-2-2(3)(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF APPELLATE REVIEW

The issues presented on review of the two interlocutory orders are as follows:

1. Does the Citizen Participation in Government Act, Utah Code Ann. § 78-58-101, *et seq.*, (hereinafter, the "SLAPP Act") apply to the Developer's action, filed in response to the acts of Mrs. Tobias and Mrs. Feld while participating in the process of government, which was continued primarily to harass or punish Mrs. Tobias and Mrs. Feld for exercising their First Amendment rights in opposing the Developer's zoning change request? Statutory construction issues are legal questions resolved without deference to the lower court. *Avila v. Winn*, 794 P.2d 20, 22 (Utah 1990). This issue was raised in Mrs. Tobias and Mrs. Feld's memorandum opposing the Developer's motion for summary judgment, pp. 59-64 (R. 2084-

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[1] SLAPP suits are lawsuits without substantial merit that are brought to stop citizens from exercising their political rights, or to punish them for having done so. *See Gordon v. Marrone*, 155 Misc. 2d 726, 736, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992).

[2] "The First Amendment was intended to promulgate the discussions of governmental affairs." *State ex rel. T.M.*, 2001 UT App 314, ¶ 25, 37 P.3d 1188, 1194.

[3] Copies of the two interlocutory orders are attached as Addendum 2.

2089) and in oral argument on January 27, 2003 (Transcript January 27, 2003 proceeding (hereinafter "Tr. 1/27/03") R. 4405, pp. 35-43.

2. If the SLAPP Act applies, do the SLAPP Act's requirements that an action be brought or continued primarily in response to a defendant's acts while participating in the process of government and that the action be brought or continued primarily to harass a defendant create a factual or legal inquiry? This issue is also a question of statutory construction and is reviewed *de novo*. *Avila v. Winn*, 794 P.2d 20, 22 (Utah 1990). This issue was raised in Mrs. Tobias' and Mrs. Feld's memorandum opposing the Developer's motion for summary judgment (R. 2026-2029) and oral argument on January 27, 2003. (Tr. 1/27/03, R. 4405, pp. 38-40)

3. If the SLAPP Act criteria require determination of factual issues, should the court's summary judgment based on a finding that the Developer's lawsuit was not continued for an improper purpose be reversed when that finding is contrary to clear and convincing undisputed facts? The issue of whether a genuine issue of material fact exists is reviewed without deference to the trial court. *Gerbich v. Numed, Inc.*, 977 P.2d 1205, 1207 (Utah 1999). The issue was raised in Mrs. Tobias' and Mrs. Feld's memorandum opposing the Developer's motion for summary judgment (R. 2028) and in oral argument on January 27, 2003. (Tr. 1/27/03, R. 4405, p. 38)

4. Did the lower Court err in ruling that a facially pled claim does not, and cannot, violate the SLAPP Act? Statutory construction issues are legal questions resolved without deference to the lower court. *Avila v. Winn*, 794 P.2d 20, 22 (Utah 1990). This issue was raised in Mrs. Tobias and Mrs. Feld's memorandum opposing the Developer's motion for summary judgment, (R. 2083-2089) and in oral argument on January 27, 2003. (Tr. 1/27/03 R. 4405, pp. 39, 63-65)

5. Did the lower Court err in dismissing two of Mrs. Tobias' and Mrs. Feld's common-law SLAPP suit counterclaims, and their request for punitive damages, requiring reversal, when (a) the lower Court erroneously ruled that the tort of negligent infliction of emotional distress requires outrageous conduct; (b) the lower Court erroneously ruled that a claimant who proves an abuse of process claim may not seek punitive damages; and/or (c) when the lower Court erroneously ruled that a lawsuit continued to harass or punish citizens for exercising a first amendment right to speak out against a zoning change is not sufficiently outrageous to support a claim for intentional infliction of emotional distress? The standard for review of a 12(b)(6) order of dismissal is *de novo* with no deference to the trial court. Only when a claimant cannot prevail on any possible set of facts pled in support of the claim is a dismissal appropriate, *e.g., Bennett v. Jones, Waldo, Holbrook & McDonough*, 2003 UT 9, ¶ 30, 70 P.3d 17, 25. This issue was raised in Mrs. Tobias' and Mrs. Feld's memorandum in Opposition to dismiss the Common-law counterclaims (R. 2698-2701) and in the January 27, 2003 oral argument. (Tr. 1/27/03, R. 4405, pp. 38-40)

6. Did the trial Court err in granting a summary judgment dismissing Mrs. Tobias' and Mrs. Feld's abuse of process claim? A grant of summary judgment is reviewed for correctness without deference to the trial court. *Gerbich v. Numed, Inc.*, 1999 UT 37, ¶ 10, 977 P.2d 1205, 1207. This issue was raised in Mrs. Tobias' and Mrs. Feld's memorandum opposing summary judgment. (R. 3592) and in oral argument on June 30, 2003. (Tr. 6/30/03 R. 4408, pp. 5, 54-59)

7. Does the Developer have a claim for relief for intentional interference with economic relations for statements allegedly made by Mrs. Tobias and Mrs. Feld while opposing a zoning change at City Council proceedings, or is their speech protected from such a claim by the First Amendment, the SLAPP Act, and/or the *Noerr-Pennington* doctrine? This issue is a legal question reviewed for correctness without deference to the lower court.

This issue was raised in Mrs. Tobias' and Mrs. Feld's memorandum in support of their motion for summary judgment. (R. 3170-3172) and at oral argument on June 30, 2003, (R. 4408, p.38)

8. Did the lower Court err in not granting Mrs. Tobias' and Mrs. Feld's motions for summary judgment on the Developer's pled claims for interference with contractual and economic relations? This issue was raised in Mrs. Tobias' and Mrs. Feld's memorandum in support of their motion for summary judgment. (R. 3151-3152, 3166-3175) and at oral argument on June 30, 2003. (R. 4408, pp. 8-19, 37-39.) A denial of summary judgment is reviewed for correctness without deference to the trial court. *Schaerrer v. Stewart's Plaza Pharmacy, Inc.*, 2003 UT 43, ¶ 14, 79 P.3d 922, 927.

CONSTITUTIONAL PROVISIONS AND STATUTES WHOSE INTERPRETATION IS DETERMINATIVE

The determinative provisions and statutes are the First Amendment to the United States Constitution and the Citizen Participation in Government Act, Utah Code Ann. § 78-58-101, *et seq.* Copies of the determinative provisions are attached in Addendum 1.

STATEMENT OF THE CASE

I. Nature of the Case

This case is a SLAPP suit proceeding. The Developer sued Mrs. Tobias and Mrs. Feld, two citizen housewives who opposed its multi-office-building application to change South Jordan's Master Plan and Zoning on six parcels of Jordan river-bottom land. The Developer's unpled claim is that since Mrs. Tobias' and Mrs. Feld's opposition delayed the City's zoning decision on one of the six parcels, Mrs. Tobias and Mrs. Feld must pay the Developer $1.2 million.[4]

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[4]The Developer's unpled claim arose after it became obvious that the undisputed facts require a summary judgment dismissal of its pled claims. *See* point V. of the Argument section of this Brief.

Mrs. Tobias and Mrs. Feld counterclaimed for abuse of process, intentional infliction of emotional distress, negligent infliction of emotional distress and for a claim under the SLAPP Act.

II. Course of Proceedings

There are two interlocutory orders at issue. The first Order, entered May 30, 2003, granted the Developer a summary judgment dismissing Mrs. Tobias' and Mrs. Feld's SLAPP suit counterclaim. (R. 4160-4163) In granting summary judgment, the lower Court erroneously created a legal issue out of a factual question, *i.e.*, why did the Developer continue its action against Mrs. Tobias and Mrs. Feld after its project received City approval and after it had already sold all of its interest in the property at issue?

Further, in so ruling, the lower Court used an incorrect legal standard. The Court used a Rule 12(b)(6) standard and ruled that because the Developer facially pled a claim, it could not, as a matter of law, be continuing its action to punish Mrs. Tobias and Mrs. Feld. The Court reasoned:

> [T]he Court's ruled . . . that they, [the developers], stated a cause of action . . . . The fact that they continue to prosecute the case, to make their contract claim is not an interference . . . so far as . . . this SLAPP statute's concerned.

(Tr. 1/27/03, R. 4405, p. 77.)

The lower Court also erroneously reasoned that since the Developer sold its project in 1999, the Developer could not be continuing its lawsuit in violation of the SLAPP Act:

> I was impressed that it [the developer during the 2002 deposition of Mrs. Tobias] certainly asked personal information and harassing information. If the SLAPP act had been enacted and effective back during this period of time, from 1996 through 1999, up to the time Plaintiff's interest terminated in the contract, I would have thought the Defendants have a good counterclaim; but it was not effective then, didn't become effective until April whenever it was, May of 2001.
>
> For these reasons, I don't see a . . . retroactive application of the law and no continuing past that year 1999, so I don't believe the

> Defendants have any claim under that statute, so I am going to order that count-- first claim dismissed.

(Tr. 1/27/03, R. 4405, p. 78.)

This same Order also granted the Developer's Rule 12(b)(6) motion to dismiss Mrs. Tobias' and Mrs. Feld's common-law counterclaim of negligent and intentional infliction of emotional distress and ruled that Mrs. Tobias and Mrs. Feld could not seek punitive damages even if they later prevailed on their remaining abuse of process claim. (R. 4160-4163)

The second Order, entered August 4, 2003, granted the Developer's motion for a summary judgment dismissal on Mrs. Tobias' and Mrs. Feld's last remaining counterclaim, a claim for abuse of process. (R. 4385-4390) The second Order also denied Mrs. Tobias' and Mrs. Feld's motion for summary judgment on the Developer's claims for intentional interference with contractual and economic relations. (R. 4385-4390)

III. Statement of Facts Relevant to the Issues Presented for Review

When considering a 12(b)(6) motion, the Court must accept the factual allegations in the Counterclaim as true and consider them and all reasonable inferences to be drawn from them in a light most favorable to the party opposing the Rule 12(b)(6) motion. *Whipple v. American Fork Irrigation Co.*, 910 P.2d 1218, 1219 (Utah 1996). On appeal of a summary judgment, the party against whom the judgment has been entered is entitled to have all of the facts presented and all the inferences fairly arising therefrom considered in the light most favorable to him. *Winegar v. Froerer Corp.*, 813 P.2d 104, 107 (Utah 1991). Viewed in the foregoing light, the relevant facts[5] are as follows:

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[5] The facts related to the lower Court's reasoning on the first interlocutory order are set forth in Part II above.

1. The Developer filed its application to change South Jordan City's master plan and open space zoning in October of 1996.[6] The application was for a multi-building office development on six parcels of Jordan river-bottom land. *See* Developer's Memorandum in Support of Summary Judgment ¶ 1. (R. 1913)

2. Mrs. Tobias and Mrs. Feld are South Jordan citizens who opposed the zoning change. They organized a neighborhood group, sent letters, met with the Governor and public officials, and spoke at City public hearings. Hundreds of residents rallied to preserve the river-bottom land. *See* Tobias Affidavit 1/3/03 (R. 2105-2133), Feld Affidavit 1/3/03 (R. 2144-2172)

3. The City quickly granted the master plan change, except for a parcel owned by the Williams family, which was under a conditional Real Estate Purchase Contract (the "First REPC") for sale to the Developer. *See* City Council Meeting Minutes 1/28/97 (R. 1244-1248)

4. One of the reasons the Williams parcel was not included in the Master Plan change was that South Jordan City was trying to find a way to use the City Park and the Williams parcel to create a buffer around the Developer's project. There was also discussion about allowing citizens to explore the possibility of building a science center on the Williams parcel. *See* Deposition of David Millheim., pp. 107-108, 110-111 (R.3502-3505)

5. Approval of the Developer's application for the master plan change was made conditional upon the Developer meeting several requirements. Failure to timely satisfy the conditions would result in reversion of the property to its prior use designation. The City Council gave the Developer ninety (90) days to apply for a zoning change. City Council Meeting Minutes 1/28/97 (R. 1245-1247)

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[6] The City of South Jordan spent thousands of dollars to create and complete the Jordan River Parkway Masterplan, "A Master Plan for the Preservation and Development of the South Jordan River Parkway." (R. 1075)

6. The Developer applied for the zoning change for the property, including the Williams parcel and the Planning Commission recommended that the zoning change be approved. Planning Commission Minutes April 24, 1997 (R. 1259-1261)

7. At a special meeting on April 28, 1997, the City Council voted unanimously to approve the Developer's rezoning application to Office/Service for approximately 65 acres, but did not include the Williams parcel. City Council Meeting Minutes April 28, 1997 (R.1265-1269) South Jordan City did not master plan or rezone the Williams parcel prior to the expiration of the First REPC on June 30, 1997. Deposition of Gerald Anderson, page 63. (R. 3200)

8. Solely because the Developer did not immediately get the zoning it requested on the Williams parcel, the Developer chose not to exercise its right to purchase the land under the First REPC prior to its expiration, even though the First REPC explicitly allowed the Developer to close without the zoning changes. Deposition of Gerald Anderson (R. 3212-3213)

9. The Developer subsequently entered into a Real Estate Purchase Contract (the "Second REPC") with the Williams family for purchase of the Williams parcel on November 25, 1997. (R. 3233)

10. At its April 28, 1997 meeting, the City Council also adopted Ordinance 97-7, which addressed building criteria, open space, trails, streets, traffic, site plan requirements public improvements and other issues with regard to the Developer's project. (R. 1271-1275). Ordinance 97-7 required that the Developer satisfy certain conditions not later than December 28, 1997, or the property would revert to its original A-5 zoning. (R. 1273)

11. Despite opposition by citizens including Mrs. Tobias and Mrs. Feld, the City Council ultimately extended the time for the Developer to meet the criteria of Ordinance 97-7 until April 28, 1998. *See* Ordinance 97-20, adopted December 16, 1997. (R. 1342.)

12. A hearing on the Developer's general site plan developed in response to Ordinance 97-7 was to be held before the Planning and Zoning Commission on March 11, 1998. On March 5, 1998, Mrs. Tobias and Mrs. Feld together with 19 other concerned citizens attended a citizens meeting with South Jordan City Mayor, Dix McMullin, to express their concerns regarding the Developer's *See* Affidavit of Janalee Tobias, (R. 2131)

13. On March 6, 1998, one day after the meeting with Mayor McMullin and five days before a Planning and Zoning Commission Meeting that would determine whether the Developer's general site plan would be approved, the Developer served a Summons and Complaint (the "Original Complaint") upon defendant Save Our South Jordan River Valley, Inc. ("SOS"). The Original Complaint named Mrs. Tobias, Mrs. Feld, SOS, and 20 John Does. *See* Original Complaint (R. 2297); Affidavit of Janalee Tobias (R. 2131)

14. Notwithstanding service of the Original Complaint, Mrs. Tobias and Mrs. Feld attended the Planning & Zoning Commission hearing on March 11, 1998, and voiced their concerns. Affidavit of Janalee Tobias (R. 2131)

15. At the March 11, 1998 meeting, the Planning and Zoning Commission voted to approve the Developer's general site plan. *See* Minutes of Planning and Zoning Commission Meeting, March 11, 1998 (R. 3484). The amendment to the Master Plan rezoned the Williams Property to OS - office service. *See* Deposition of David Millheim (R. 3506)

16. After receiving approval of its general site plan, the Developer made changes to the Complaint initially served upon SOS and filed a revised Complaint (the "Revised Complaint") on March 17, 1998. The Developer knew that its lawsuit could reasonably be considered a SLAPP suit. Consequently, it inserted the following self-serving language in as a "Preliminary Statement" in paragraph 8 of the Revised Complaint:

> This complaint is filed solely for the purpose to stop the wrongful conduct, as alleged herein, by SOS of interfering with contractual

> and economic relationships of Anderson Development. It is not the intention of Anderson Development, as alleged by Tobias and Feld in public statements and by their attorney, as reported recently in the press, that anything in this complaint is designed to intimidate, restrain, chill or influence SOS's political or community activities or their exercise of First Amendment rights of freedom of speech pertaining to the development of any real property noted herein. This complaint addresses only wrongful conduct by SOS and others against Anderson Development's contractual and economic relationships.

Revised Complaint, ¶ 8 (emphasis added) (R. 3)

17. Importantly, paragraph 8 of the Revised Complaint was directly contradicted by the Developer's later proposal to dismiss its lawsuit if Mrs. Tobias and Mrs. Feld would only agree "*to be restrained from opposing or participating in discussion arising out of or relating . . . to the development in any state, county, local, community or other public meetings, hearings, councils, committees, etc.*" (R. 2601-2602) (emphasis added) *See* Addendum 3, ¶ 2.02.01.

18. The Second REPC closed on April 17, 1998 - one month after the filing of the Revised Complaint. (R.3244-3253)

19. Mrs. Tobias and Mrs. Feld originally retained Ross "Rocky" Anderson and the firm of Anderson and Karrenberg to represent them. Mr. Anderson filed a Motion to Dismiss Complaint and for the Award of Attorney's Fees and Costs on April 21, 1998, which the lower Court summarily denied, stating, *inter alia,* "the Plaintiff has stated a cause of action in its complaint of intentional interference with existing economic relations or prospective economic relations." *See* Disposition Summary dated December 8, 1998 (R. 2353)

20. Mr. Anderson and his firm withdrew on June 3, 1999. (R. 138) On June 8, 1999, immediately after Mrs. Tobias' and Mrs. Feld's counsel withdrew, the Developer filed

its Amended Complaint. (R. 143)[4] The "Preliminary Statement" was again included at paragraph 9 of the Amended Complaint. However, the Amended Complaint was filed over one year after the sale of the Williams parcel had been consummated pursuant to the Second REPC on April 17, 1998. *See* Amended Complaint, ¶ 9. (R. 145)

21. Mrs. Tobias and Mrs. Feld filed their answers to the Amended Complaint *pro se* on July 8, 1999. The Developer did nothing in the lawsuit for over two years. Accordingly, the lower Court issued a Notice of OSC for Dismissal on September 17, 2001, scheduling a hearing for October 15, 2001. (R. 327)

22. Mrs. Tobias and Mrs. Feld appeared at the OSC hearing. The Developer did not appear, but belatedly filed a Certificate of Readiness for Trial. (R. 329-333)

23. Mrs. Tobias and Mrs. Feld subsequently hired the law firm of Parry Anderson & Gardiner to represent them and their citizens' group, SOS. The firm filed an answer on behalf of SOS and demanded a jury trial. (R. 371)

24. Upon receiving Court permission, Mrs. Tobias and Mrs. Feld subsequently filed a SLAPP Act counterclaim and common-law SLAPP-suit counterclaims for abuse of process, and intentional and negligent infliction of mental distress. They also demanded a jury trial. *See* Ruling on Motion 5/28/02 (R. 928) and Counterclaim (R. 988)

25. As required by § 78-58-103 of the SLAPP Act, Mrs. Tobias and Mrs. Feld specified in detail "the conduct asserted to be the participation in the process of government believed to give rise to the [Developer's] complaint." In their Counterclaim, they identified 77 instances, each supported by exhibits, wherein they participated in the process of government in opposing the Developer's zoning change application. (R. 988-1437)

26. Additional undisputed facts which clearly and convincingly show the Developer's lawsuit was "commenced and continued for the purpose of harassing,

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[4]A copy of the Developer's Amended Complaint is attached as Addendum 4.

intimidating, [or] punishing" Mrs. Tobias and Mrs. Feld for participating in the process of government follow. These same undisputed facts justify a summary judgment dismissal of the Developer's claims for intentional interference with prospective economic relations and existing contractual relations:

a. Mrs. Tobias and Mrs. Feld spoke in opposition to the Developer's application at the first Planning Commission public hearing held on the application on November 20, 1996. The Planning Commission denied the application and the Developer appealed to the City Council. On December 13, 1996, four days prior to the City Council's first public hearing on the Developer's application, the Developer mailed a letter to Mrs. Tobias and Mrs. Feld threatening, "any effort by you or anyone else to interfere with our rights may subject each person involved to the possibility of litigation and the payment of damages. Damages literally could be in the millions of dollars." The letter was delivered on the day of the public hearing for maximum impact. *See* Developer's letter 12/13/96 (R. 1183); Tobias Affidavit 1/3/03, ¶ 69 (R. 2114-2115); Feld Affidavit 1/3/03, ¶ 69 (R. 2153-2154). A copy of the Developer's letter is attached as Addendum 5.

b. On March 6, 1998, five days before the final public hearing before the Planning and Zoning Commission on the Developers general site plan, the Developer served the Original Complaint on Mrs. Tobias and Mrs. Feld, but did not file it with the Court. (R. 2297) The Original Complaint was immediately labeled a SLAPP suit by the media. (R. 2097)[5] Consequently, the Developer filed the

[5]The Developer also recently sued those in Bluffdale and Riverton who opposed its projects in those cities. The Bluffdale case was filed in Third Judicial District Court, Case No. 000205566. (R. 2786) The Riverton case was filed in Federal District Court, Case No. 2:01CV00165ST. (R. 2831)

Revised Complaint with the self-serving paragraph 8 language. *See* Summons and Complaint 3/17/98 (R. 1); Tobias Affidavit 1/3/03 (R. 2131-2132); Feld Affidavit 1/3/03 (R. 2170-2171).

c. The Developer sued Mrs. Tobias and Mrs. Feld for allegedly interfering with the First REPC and/or the "consummation of the [second] real estate contract" between the Developer and the Williams family. Revised Complaint (R. 11); Amended Complaint (R. 153) But *it is* ***undisputed*** the Williams family never breached or repudiated any REPC with the Developer and consummated the Second REPC exactly according to its terms. Boyd Williams Deposition, pp. 22, 30-32, 37, 81, 82. (R. 3269, 3271-3273, 3283-3284)

d. The Developer elected not to purchase the Williams parcel pursuant to the First REPC.[6] Furthermore, the Developer subsequently assigned the Buyer's interest in the Second REPC to Lake View Farms, L.L.C. and Janice Phelps Andersen *one month* after filing its lawsuit against Mrs. Tobias and Mrs. Feld. Anderson Depo., page 145, lines 6-8 (R. 3214); Real Estate Purchase Contract dated April 17, 1998. *See* Exhibit 36 to Anderson Depo. (R. 3244)

e. The Developer's recent, but unpled, claim is that Mrs. Tobias' and Mrs. Feld's petitioning activities before South Jordan City officials persuaded the City to delay the requested master plan and zoning changes for the Williams Property, that the First REPC expired before the requested master plan and zoning changes were enacted, and that, because of the delay, the Developer did not close the First REPC and purchase the Williams Property, but was forced to

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[6] In reality, the Developer never intended to purchase the Williams parcel, but rather planned to have an investor, Lake View Farms, L.L.C., purchase the Williams parcel in a §1031 exchange. *See* Anderson Depo., page 140, lines 8-20. (R. 3212-3213)

negotiate the more expensive Second REPC. *See* Plaintiff's Opposition Memorandum 2/20/03, p. 5, ¶ 3 (R. 3675); Deposition of Gerald Anderson, (R. 3201, 3204-3207; Deposition of Michael L. Hutchings (R. 3515-3520)

f. But *it is undisputed* the Developer could have closed the First REPC with the Williams and chose not to do so solely because it did not then have its requested Williams' parcel zoning (R. 3212-3213), a requirement *it could have expressly waived under the terms of the First REPC*. First REPC ¶ 7. (R. 2234)

g. *It is undisputed* that the South Jordan City Council, not Mrs. Tobias and Mrs. Feld, postponed a decision on the Developer's zoning application on the Williams' parcel, but the Developer never sued South Jordan City. *See* City Council Minutes 1/28/97. (R. 1244)

h. *It is undisputed* that David Millheim, the former South Jordan City Administrator, talked with Boyd Williams in behalf of South Jordan City about purchasing the Williams Property while it was still under contract with the Developer, but he was not sued for doing so. *See* Millheim Depo. (R. 3507)

i. *It is undisputed* that after expiration of the First REPC, the Williams family received expressions of interest in the Williams parcel from Wendy Fisher of Utah Open Lands, Jim Davis of the Trust for Public Lands, and Salt Lake County Commissioners Randy Horiuchi and Brent Overson, among others, and that the Williams family used these expressions of interest to justify increasing the price of the Williams parcel in their negotiations with the Developer. Yet none of those individuals were sued. *See* Deposition of Boyd Williams (R.3279-3281, 3288-3290)

j. The Developer's purported damages claim is for the difference in the purchase price between the First REPC and the Second REPC. *See* Anderson Depo. (R.

3202) However, the Developer *never purchased* the Williams Property. Lake View Farms, L.L.C. and Janice Andersen purchased the Williams parcel in a § 1031 exchange. Lake View Farms provided all the funding to purchase the Williams Property. The Developer paid **nothing** to the Williams family, the Developer was reimbursed for its costs and earnest money by Lake View Farms, and the Developer was paid $21,084.17 in "development fees" by Lake View Farms at closing. *See* Gerald Anderson Depo. (R. 3210); Closing Statements (R. 3523-3527)

k. Mrs. Tobias and Mrs. Feld's activities were widely reported by the press. The press described Mrs. Tobias and Mrs. Feld as "nature lovers" and "South Jordan residents." In contrast, the press portrayed the Developer as one who disdained the public and was very litigious. The Developer was quoted as saying, "The [South Jordan City] council is not supposed to take in public opinion." Jon Ure, *Delay Delights Foes of S. Jordan Project,* The Salt Lake Tribune, Nov. 27, 1997. (R. 2245); Don Baker, *Riverbottoms Battlefield,* Deseret News, Dec. 14, 1997.

l. The Developer's counsel told Mrs. Tobias and Mrs. Feld that they would have to obtain an attorney to answer for their neighborhood group, SOS, because SOS was a corporation. After requiring Mrs. Tobias and Mrs. Feld to go to the expense of obtaining an attorney to answer for SOS, the Developer sought and obtained an Order dismissing SOS because it "is an unnecessary party to this litigation and it is in the interest of the parties and judicial economy to have SOS dismissed." Motion to Voluntarily Dismiss SOS, 2/16/02 (R. 643), Tobias Affidavit 4/19/02. (R. 832)

m. When served the Developer's pleadings, Mrs. Tobias and Mrs. Feld answered *pro se*, and did not know how to demand a jury trial, whereas SOS with counsel did demand a jury trial. A reasonable inference is that the Developer's motive for moving to dismiss SOS was a mistaken belief that if SOS was dismissed, there could not be a jury trial. *See* Tobias Affidavit 4/19/02. (R. 832)

n. The Developer took the all-day deposition of Mrs. Tobias. The lower Court acknowledged that the deposition did not delve into the relevant issues of the Complaint or the Counterclaim, but instead into personal items, Tr. 1/27/03, p. 78. (R. 4405) They include: (1) Mrs. Tobias' prior education and work experience (pp. 6-16); (2) Mrs. Tobias' meeting and courtship with her husband and on her husband's work experience (pp. 17-24); (3) The locations of the homes in which Mrs. Tobias and her husband have lived, who the contractors were and who built the homes (pp. 24-32); (4) Mrs. Tobias' political and volunteer work (pp. 40-62, 86-91); (5) Mrs. Tobias' campaigns for public office (pp. 62-84); (6) Mrs. Tobias' involvement with Women Against Gun Control (pp. 92-116); (7) Mrs. Tobias' involvement in other local community issues (pp. 117-135); (8) Mrs. Tobias' friendship with another Defendant, Brent Foutz (pp. 136-195); (9) Mrs. Tobias' medical history (pp. 196-298); and (10) Mrs. Tobias' attorneys' and fee arrangement with her attorneys (pp. 219-227). Janalee Tobias Deposition (R. 2394-2451)

o. In its Summary Judgment Reply Memorandum, the Developer forcefully, but without explanation, complained that Mrs. Tobias belonged to "Ladies At Home, Women Against Gun Control, three Neighborhood Watch Groups, People Against More Taxes, Citizens for Smart Transportation, Citizens for

Term Limits" and that she had worked on nine political campaigns. *See* Plaintiff's Reply Memorandum 2/25/03, p. 17, n. 8 and 9. (R. 4004)

p. In its submissions, the Developer also accused Mrs. Tobias of belonging to a group that "was listed among hate groups by the National Simon Wiesenthal Center, a prominent Los Angeles Organization whose focus is ending Anti-Semitism and bigotry around the world." The Developer failed to advise the Court that the group "Women's Against Gun Control" was de-listed after Mrs. Tobias talked to a Wiesenthal Center representative, who acknowledged that the listing had been a mistake. *See* Plaintiff's Reply Memorandum 2/25/03, p. 18, n. 10. (R. 4005)

27. As a result of the Developer's lawsuit, Mrs. Tobias and Mrs. Feld have been forced to second mortgage their homes and suffered severe physical and psychological disorders including severe depression, headaches, and muscle stress causing chronic neck, back and chest pain. Tobias Affidavit 1/3/03 (R. 2134); Feld Affidavit 1/3/03 (R. 2173)[7]

28. As a direct result of Mrs. Tobias and Mrs. Feld bringing this lawsuit to the attention of the Legislature, the Legislature adopted and passed the SLAPP Act in 2001. Affidavit of D. Chris Buttars (R. 2456-2458)

29. At the hearing of January 27, 2003, the lower Court acknowledged that "[Mrs. Tobias and Mrs. Feld] have argued that [the Developer's] actions were a continuation to harass, intimidate or punish the Defendants," but then ruled that the Developer's actions were not subject to the SLAPP Act, because the complaint facially stated a claim:

> The Court has ruled, that they've [the Developer] stated a cause of action . . . [and] the fact that they continue to prosecute the case to make their contract claim is not an interference . . . so far as this SLAPP statute is concerned.

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[7] The psychological and physical ailments were further substantiated by the expert report of Dr. David McCann.

* * *

> The fact that they go on with the lawsuit to collect on the claim for interference with contractual rights, doesn't make it a continuing matter so far as the SLAPP suit is concerned.

Tr. 1/27/03. (R. 4405, p. 76-77)

30. The lower Court also reasoned that the Developer sold its interest in the office project in 1999, so the lower Court could not rule that the 2002 deposition abuse of Mrs. Tobias violated the SLAPP Act. In a display of tortured reasoning the lower Court said:

> I was impressed that it certainly asked personal information and harassing information. If the SLAPP Act had been enacted and effective back during this period of time, from 1996 through 1999, up to the time Plaintiff's interest terminated in the contract, I would've thought the Defendants have a good counterclaim, but it was not effective then, didn't become effective until whenever it was, April, May 2001. For these reasons, I don't see a continuing, no retroactive application of the law, and no continuing past that year of 1999, so I do not believe the Defendants have any claim under that statute, so I'm going to order that count, First Claim, dismissed.

Tr. 1/27/03. (R. 4405, p. 78)

31. The lower Court also granted the Developer's Rule 12(b)(6) Motion to Dismiss Claims for Intentional and Negligent Infliction of Emotional Distress by making two erroneous legal conclusions: (1) that the misconduct pled against the Developer was not "extreme, outrageous, intolerable conduct;" and (2) that the tort of ***negligent*** infliction of emotional distress requires outrageous misconduct. Tr. 1/27/03. (R. 4405, p. 79)

32. Finally, the lower Court denied the Developer's Rule 12(b)(6) Motion to Dismiss the Abuse of Process Claim and Statutory Bad Faith Claim, but ignored the factual allegations pled in the counterclaim to conclude that Mrs. Tobias and Mrs. Feld could not seek punitive damages. Tr. 1/27/03. (R. 4405, p. 79)

33. The first Order at issue was entered on May 30, 2003.

34. This Court granted permission to file an interlocutory appeal on July 28, 2003. (R. 4381)

35. The Developer now relies on an unpled claim. It says that the City postponed a zoning decision on the Williams parcel, the Developer's First REPC with the Williams lapsed and the Developer had to negotiate a more expensive Second REPC with the Williams. *See* Plaintiff's Reply Memorandum in Opposition to Mrs. Tobias' and Mrs. Feld's Motion for Summary Judgment, 2/20/03 p. 5 ¶ 3 (R. 3675); Affidavit of former South Jordan City Councilman Thomas L. Christensen, February 19, 2003. (R. 3839)

36. Specifically, the Developer complains that Mrs. Tobias and Mrs. Feld asked the City Council for a delay in granting the Williams parcel zoning change so they could finish raising money for purchase of the ground as open space. *Id.*

37. Because statements made before the City Council are protected from suit by the First Amendment, the *Noerr-Pennington* doctrine, and the SLAPP Act, Mrs. Tobias and Mrs. Feld moved for summary judgment. (R. 3170)

38. The lower Court denied Mrs. Tobias' and Mrs. Feld's Motion for Summary Judgment and dismissed their abuse of process claim in its interlocutory order on August 4, 2003. (R. 4385) *See* Ex. 2.

39. This Court granted permission to file an interlocutory appeal October 29, 2003.

40. The parties' joint motion to consolidate the two interlocutory appeals was granted on December 9, 2003.

SUMMARY OF ARGUMENT

The lower Court's summary judgment dismissing Mrs. Tobias' and Mrs. Feld's SLAPP Act counterclaim should be reversed because the lower Court's legal conclusion that the SLAPP Act does not apply to the Developer's lawsuit is clearly wrong. First, by its own explicit terms, the SLAPP Act applies to lawsuits that are continued for the purpose of harassing or punishing those who exercise their First Amendment rights by speaking out in a governmental proceeding. Second, to withstand SLAPP Act scrutiny, it is not sufficient

to facially plead a claim. The SLAPP Act requires a factual inquiry to determine whether the Developer's lawsuit was continued to chill or punish First Amendment expression and/or participation in the process of government. Finally, there are clear and convincing facts suggesting that the Developer's lawsuit was filed to chill and punish Mrs. Tobias and Mrs. Feld for opposing the Developer's zone change application. Consequently, the lower Court's granting of the summary judgment should be dismissed and Mrs. Tobias' and Mrs. Feld's statutory SLAPP suit counterclaim remanded for trial.

Similarly, the lower Court's Rule 12(b)(6) order dismissing Mrs. Tobias' and Mrs. Feld's common-law claims for intentional infliction of emotional distress and negligent infliction of emotional distress should be reversed. First, the court incorrectly ruled that the tort of infliction of emotional distress requires outrageous conduct. Second, whether the Developer's conduct in this case is outrageous, requires a factual determination, a determination of which cannot be satisfactorily resolved in a Rule 12(b)(6) proceeding.

The lower Court's dismissal of Mrs. Tobias' and Mrs. Feld's request for punitive damages must be reversed because the court committed plain error. In the event that Mrs. Tobias and Mrs. Feld prevail on the abuse of process claim, they are entitled to seek punitive damages if at trial they meet Utah's punitive damages statutory criteria.

Likewise, the lower Court's subsequent summary judgment dismissing Mrs. Tobias' and Mrs. Feld's abuse of process claim should be reversed because whether the Developer is using the legal system for an improper purpose creates a factual inquiry.

In contrast, the Developer's pled and unpled claims for intentional interference with contractual and/or economic relations should have been dismissed on a summary judgment because of undisputed dispositive facts. In summary, the undisputed facts are: first, no one breached any existing contract with the Developer. It is undisputed that the Williams timely and fully consummated all contracts at issue. Second, it is undisputed the Developer never

purchased and never intended to purchase the Williams' parcel. Third, as a matter of law the acts of the City Council and the Developer's own decision not to close on its first contract with the Williams' family was the proximate or legal cause of any alleged injury to the Developer. Further, any statements to the effect that "the property is worth more than you're being offered for it," are not actionable statements. Additionally, Mrs. Tobias' and Mrs. Feld's conduct before city officials is privileged by the First Amendment and *Noerr-Pennington doctrine*. Finally, as a procedural matter, Mrs. Tobias' and Mrs. Feld's motion on summary judgment to dismiss the Developer's claims should have been granted because the Developer failed to contradict Mrs. Tobias' and Mrs. Feld's statement of fact in the manner required by Rule 4-501 then in existence.

ARGUMENT

I. The SLAPP Suit Phenomenon.

A new breed of lawsuit is stalking American citizens. Like some new strain of virus, these court cases carry dire consequences for individuals, communities and the body politic. Thousands are being sued simply for exercising their First Amendment rights: the right to communicate their views to governmental officials, to speak out on public issues. GEORGE W. PRING & PENELOPE CANAN, SLAPPs - GETTING SUED FOR SPEAKING OUT 1 (1996)(hereinafter "SLAPPs").

Citizens are routinely sued for millions of dollars for such "all-American" political activities as circulating a petition, writing a letter to the editor, testifying at a public hearing, reporting violations of the law, lobbying for legislation, peacefully demonstrating or otherwise attempting to influence governmental action. *Id.*

The danger to the First Amendment is both clear and convincing. As explained in *Gordon v. Marrone*, 155 Misc. 2d 726, 736, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992),

SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer forces upon the target the expenses of a defense:

> The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted, and the closer the SLAPP filer moves to success. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism. Needless to say, an ultimate disposition in favor of the target often amounts merely to a pyrrhic victory. Those who lack the financial resources and emotional stamina to play out the "hand" face the difficult choice of defaulting despite meritorious defenses or being brought to their knees to settle. The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.

155 Misc. at 736, 590 N.Y.S. 2d at 656.

SLAPPs normally do not advertise themselves as such. Filers do not usually sue people for "exercising their First Amendment rights" or "petitioning the government". Instead, to gain and maintain access to the courts, filers must recast or camouflage the targets' political behavior as a common legal violation. SLAPPs at 150. Consequently, SLAPP filers repeatedly use six predictable legal theories to mask their real purpose. Ranked at number two among the top six classes of claims are claims for interference with contractual or economic relations. *Id.* Consequently, the Developer's choice of legal theories in the case at bar is not surprising. The case at bar is the prototypical SLAPP suit.

II. The Lower Court Erred in Granting Summary Judgment on Mrs. Tobias' and Mrs. Feld's SLAPP suit Counterclaim.

A. The SLAPP Act Applies to this Case – Facially Pleading a Claim Only Triggers the SLAPP Act Inquiry

The lower Court's conclusion that the SLAPP Act did not apply to the litigation at issue is strange. It is undisputed that the Developer continued this lawsuit after the Utah Legislature adopted the SLAPP Act. More importantly, the lower Court's conclusion

contradicts the plain language of Utah Code Ann. § 78-58-105 which provides in pertinent part:

> (1) A defendant in an action involving public participation in the process of government may maintain an action, claim cross-claim, or counterclaim to recover: (a) costs and reasonable attorney's fees, upon a demonstration that the action involving public participation in the process of government **was . . . continued** without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law; and (b) other compensatory damages upon an additional demonstration that the action involving public participation in the process of government **was . . . continued** for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of rights granted under the First Amendment to the U.S. Constitution. (emphasis added.)

Further, the lower Court's conclusion that the SLAPP Act does not apply because the Developer facially pled a claim is also strange. In determining whether a Developer's lawsuit triggers SLAPP Act dismissal, compensatory damages, and/or attorney's fees, the issue is not whether the Developer facially pleads a claim, but whether the action was "continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of rights granted under the First Amendment to the U.S. Constitution." Utah Code Ann. § 78-58-105(1)(b).

As set forth in Part I of the Argument section of this Brief, nearly all SLAPP suits, like the Developer's SLAPP suit, state a facial claim. Consequently, the harm of this SLAPP suit is that has forced the target, Mrs. Tobias and Mrs. Feld, into the judicial arena where the Developer has forced upon Mrs. Tobias and Mrs. Feld the expense of a defense. The longer this litigation can be stretched out, the more litigation can be churned, the greater the expense that is inflicted, and the closer the SLAPPer - the Developer - moves to success. The ripple effects of such a suit in our society is enormous. Persons like Mrs. Tobias and Mrs. Feld who have been outspoken on issues of public importance targeted in such suits or have witnessed such suits will often choose in the future to stay silent. "*Short of a gun to the head, a greater*

threat to First Amendment expression can scarcely be imagined." Cf. Gordon v. Marrone, 155 Misc. at 736, 590 N.Y.S. 2d at 656.

B. Whether the Developer's Lawsuit was Continued to Harass or Punish First Amendment Expression and/or Participation in the Process of Government Act is a Factual Issue

A disciplined review of Utah SLAPP Act shows that the question of whether a lawsuit was continued for an improper purpose is a factual inquiry. First, a defendant abused by a SLAPP suit is required to file an affidavit specifying in detail his participation in the process of government. *See* Utah Code Ann. § 78-58-103 (1)(a). Then the trial court hears and determines whether the SLAPP suit should be dismissed by considering whether clear and convincing evidence shows that the primary reason for the filing of the complaint was to interfere with the First Amendment rights of the defendant. *See* Utah Code Ann. § 78-58-104 (1)(b). To grant the relief of a dismissal and/or costs and reasonable attorney's fees and/or compensatory damages, the trial court must make factual "findings" specified in Utah Code Ann. §§ 78-58-104(2) and 78-58-105(1). In summary, the plain language of this statute repeatedly demonstrates that the question of whether the Developer's lawsuit was continued for improper purpose is a factual inquiry.

The SLAPP Act requirement for a trial court to factually determine the intent or purpose of the wrongdoer is consistent with compelling Utah case law holding that the question of intent is a factual issue. *See* p. 27 of this Brief *infra*. The *undisputed facts* set forth in ¶ 17 of the Statement of Facts section of this Brief, clearly and convincingly show that the Developer's lawsuit was continued for the purpose of interfering with Mrs. Tobias' and Mrs. Feld's First Amendment right to participate in the process of government.

III. The Lower Court Erred in Granting a 12(b)(6) Motion to Dismiss Mrs. Tobias' and Mrs. Feld's Common Law Counterclaims for Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress.

Two judicial cures for SLAPP Suits are counterclaims for intentional and negligent infliction of emotional harm. GEORGE W. PRING AND PENELOPE CANAN, "SLAPPS, GETTING SUED FOR SPEAKING OUT" 181 (1996). The reason the lower Court granted the Developer's motion to dismiss Mrs. Tobias' and Mrs. Feld's claim for negligent infliction of emotional distress was that, in the Rule 12(b)(6) proceeding, the lower Court believed that the Developer's conduct was not outrageous. This was clear error. In *Johnson v. Rogers*, 763 P.2d 771 (Utah 1988), this Court defined the elements of the tort of negligent infliction of emotional distress as follows:

> (1) if the actor unintentionally causes emotional distress to another he is subject to liability to the other for resulting illness or bodily harm if the actor: (a) should have realized that his conduct involved an unreasonable risk of causing the distress . . . (b) from the facts known to him should have realized that distress, if it were caused, might result in illness or bodily harm.

763 P.2d at 780.

Plainly, there is no requirement that the misconduct be outrageous, as is required by the tort of intentional infliction of emotional distress. *See* RESTATEMENT (SECOND) OF TORTS, § 46 cmt. a, §§ 312 and 313 (1965).

Further, the lower Court clearly erred in granting a Rule 12(b)(6) motion to dismiss Mrs. Tobias' and Mrs. Feld's intentional infliction of emotional distress claim. The question of whether litigation claims can be the instrument of causing intentional infliction of emotional distress was resolved in *Campbell v. State Farm Mutual Insurance Co.,* 2001 UT 89, 65 P.3d 1134 (*rev'd on other grounds,* 538 U.S. 408 (2003)). In *Campbell*, this Court upheld an intentional infliction of emotional distress compensatory damage award stemming in part from State Farm systematically harassing and intimidating opponents, specifically by

requiring its attorneys to "ask personal questions," by prolonging the litigation, and by abusing the process. *See Campbell* 2001 UT 89, ¶ 31; 65 P.3d at 1148, 1166. Mrs. Tobias' and Mrs. Feld's Counterclaim accuses the Developer of doing the same thing. Because a Rule 12(b)(6) proceeding requires the court to accept the facts pled as true, the lower Court should have not entered a Rule 12(b)(6) dismissal order.

Further, whether the Developer's actions "offend against the generally accepted standards of decency and morality, (the standard required for an intentional infliction of emotional distress claim) is a question to be resolved by the jury. "Where reasonable men may differ, it is for the jury subject to the control of the court, to determine whether in the particular case, the conduct is sufficiently extreme and outrageous to result in liability." *Gygi v. Storch*, 28 Utah 2d 399, 401, 503 P.2d 449, 450 (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. h (1965)).

At a bare minimum, reasonable persons could differ on whether the Developer's threat to sue the housewives for millions of dollars and the subsequent filing and continuation of a punitive million-dollar lawsuit in retaliation for Mrs. Tobias and Mrs. Feld exercising their First Amendment rights is sufficiently outrageous. Consequently, the Rule 12(b)(6) order dismissing Mrs. Tobias' and Mrs. Feld's claim of intentional infliction of emotional distress should be reversed.

IV. Genuine Issues of Material Fact Require a Reversal of the Summary Judgment Dismissing Mrs. Tobias' and Mrs. Feld's Abuse of Process Claim.

The abuse of process tort focuses not on the rightness or wrongness of the complaint or motion at issue, but instead on the question of why the lawsuit was filed and prosecuted. As explained by the Utah Supreme Court in *Crease v. Pleasant Grove City*, 519 P.2d 888, 890 (Utah 1995) "whether there was an abuse of process is to be determined as an issue independent from the rightness or wrongness of the prior steps in the proceeding." This court

further explained, "[t]his is . . . because the essence of that cause of action is a perversion of the process to accomplish some improper purpose such as compelling its victim to do something which he would not otherwise be obligated to do". *Id.* (emphasis added)

Whether the Developer filed and continued this litigation for an improper purpose is clearly a question of fact for a jury to resolve. *See Smith v. Vuicich*, 699 P.2d 763, 764 (Utah 1985) ("the jury was properly instructed on the elements of an abuse of process claim . . ."). Further acknowledging that the question of whether the judicial system was used for an improper purpose is a factual inquiry, is also consistent with overwhelming Utah case law, holding that the question of intent is a question of fact. *E.g. Robbins v. Chipman*, 2 Utah 347, 1877 WL. 12205 *1 (1877) (whether a sale has been completed is determined by the intent of the parties and the intent is always a question for the jury); *Jarman v. Reagan Outdoor Advertising, Co.,* 794 P.2d 492, 496 (Utah App. 1990) (the intent of the parties to a lease is a factual determination); *Selvage v. J.J. Johnson & Assoc.* 910 P.2d 1252, 1262 (Utah App.1996) (the question of fraudulent intent is a factual question); *State v. Blue*, 53 P. 978, 980 (Utah 1898) (criminal intent is for the jury to determine); *Wade v. Job,* 818 P.2d 1006, 1016 (Utah 1991) (whether statutory intent exists is a question of fact).

Improper purpose or improper intent can be established by direct testimony, documents and the facts or circumstances surrounding the transaction or conduct at issue. *See generally*, *State v. Gonzalez*, 2000 UT App 136, n.3, 2 P.3d 954, 958 n.3 (the requisite intent may be proven in several ways, including . . . testimony and circumstantial evidence); *State v. Widdison*, 2001 UT 60, ¶ 43-45, 28 P.3d 1278, 1287-88 (prior bad acts admissible show intent); *State v. Holgate*, 2000 UT 74, ¶ 21, 10 P.3d 346, 352 (intent can be proven by circumstantial evidence); *State v. James*, 819 P.2d 781, 789 (Utah 1991) (it is well established that intent can be proven by circumstantial evidence)*; Estate of Jones v. Jones*, 759 P.2d 345, 350 (Utah App. 1988) (extrinsic evidence of oral declaration and language of

the will itself showed intent). The facts set forth in paragraphs 6, 8, 10, 11 and 17 of the Statement of Facts section of this brief show that a jury could find the Developer repeatedly abused the judicial process. They are summarized as follows:

The Developer threatened a lawsuit just prior to the first City Council hearing on its application. The Developer served its lawsuit five days prior to the final public hearing on the Developer's general site plan. The Developer has a history of suing those who oppose his development projects. The Developer named many John Does to chill opposition of Mrs. Tobias and Mrs. Feld's neighbors. Consequently, after the lawsuit was filed, the public opposition diminished from the hundreds of initial supporters to a handful of hardy souls. Paragraph 9 of the Developer's amended complaint is an admission that the Developer knew his lawsuit could be construed as being brought to chill and punish those who exercise their First Amendment rights. The Developer required Mrs. Tobias and Mrs. Feld to retain an attorney to represent their neighborhood group, SOS and then moved to dismiss SOS because it was not necessary to have them in the lawsuit.

Further, any review of Mrs. Tobias' deposition as summarized in ¶ 17 of the Statement of Facts section of this Brief, shows that there was a continuing harassment. Finally, and most importantly, the Developer's letter and proposed settlement agreement, App. 3, and 5,[8] which was admissible to impeach Mr. Anderson's affidavit testimony shows that the Developer's real purpose was to stifle Mrs. Tobias and Mrs. Feld from speaking before governmental entities. They clearly and convincingly show that the primary purpose of the Developer's lawsuit was to end Mrs. Tobias' and Mrs. Feld's opposition to its office project before City and all governmental officials and bodies.

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[8]App. 3 is admissible pursuant to Rule 408, Utah Rules of Evidence, to impeach the Developer's affidavit testimony and to establish the Developer's misconduct, but the lower Court ruled otherwise.

In summary, whether the Developer used the judicial process for an improper purpose is at a bare minimum a question of fact to be resolved by a jury. Further, the undisputed facts set forth in ¶¶ 6, 8, 10, 11 and 17 of the Statement of Facts section of the Brief strongly suggest that a jury can and will find that the Developer abused the judicial process to silence First Amendment expression. Consequently, a genuine issue of material fact plainly exists which requires a reversal of the lower Court's summary judgment dismissing Mrs. Tobias' and Mrs. Feld's abuse of process claim.

V. The Lower Court Committed Plain Error When it Ruled that Mrs. Tobias and Mrs. Feld Cannot Seek Punitive Damages Even If They Prove an Abuse of Process Claim

The lower Court's conclusion that even if Mrs. Tobias and Mrs. Feld prove to the satisfaction of a jury their abuse of process claim, that they cannot seek punitive damages is plain error. Pursuant to Utah Code Ann. § 78-18-1(a), punitive damages may be awarded if compensatory damages are awarded and it is established that the acts of the tortfeasor are will and malicious. Thus, "[p]unitive damages may be allowed where a person seeks to wreak vengeance on another individual by using the legal process as a means to harass or insult that individual or as a means of inflicting financial harm." 1 AM. JUR. 2D *Abuse of Process* § 29 (1994). Utah law is in accord, allowing punitive damages when an abuse of process claim is proved. *See Van Dyke v. Mountain Coin Machine Distrib.*, 758 P.2d 962, 966 (Utah App. 1988) (punitive damages award for abuse of process allowed, but reduced). If Mrs. Tobias and Mrs. Feld meet the criteria set forth in Utah Code Ann. § 78-18-1(a), they are entitled to seek punitive damages. The lower Court erred in ruling otherwise.

VI. The Developer's Pled and Unpled Claims for Intentional Interference with Contractual and/or Economic Relations Should Have Been Dismissed on Summary Judgment

A. Introduction

To grant a summary judgment dismissing a claim does not require that all the facts be undisputed. It is sufficient if a dispositive fact is undisputed. *See Abdulkadir v. Western Pac. R.R. Co.*, 7 Utah 2d 53, 54, 318 P.2d 339, 340 (1957); *Disabled American Veterans v. Hendrixson*, 9 Utah 2d 152, 153, 340 P.2d 416, 417 (1959). As explained below, each of the Developer's claims should have been dismissed on summary judgment because there are undisputed dispositive facts requiring dismissal.

B. The Developer's Pled Claim for Interference with an Existing Contract Should Have Been Dismissed Because it is Undisputed that all Contracts at Issue were Timely Performed.

Plainly, a claim for interference with an existing contract requires an actual breach of the contract. This black letter law was succinctly stated by the Utah Supreme Court in *St. Benedict's Dev. Corp. v. St. Benedict's Hosp.*, 811 P.2d 194 (Utah 1991) as follows:

> A party is subject for liability for intentional interference with present contractual relations if he intentionally and improperly causes one of the parties not to perform the contract. RESTATEMENT (SECOND) OF TORTS, § 766 (1979),

811 P.2d at 201 (construing the *Leigh Furniture* requirements).

Likewise, in *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293 (Utah 1982), the Utah Supreme Court held that a claim for interference with an **existing** contract require the plaintiff demonstrate contact which intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract." *Id.* at 301, citing RESTATEMENT (SECOND) OF TORTS, § 766 (1965).

It is undisputed that the Williams did not dishonor or fail to perform any contract with the Developer. Consequently, the lower Court should have entered a summary judgment

dismissing the Developer's claim of intentional interference with existing contractual relations.

C. The Developer's Pled Claim for Interference with Economic Relations, i.e., Interference with the "Consummation of a Contract" Should Have Been Dismissed Because it is Undisputed (1) the Contract was Timely and Fully Consummated; (2) the Developer Never Purchased and Never Intended to Purchase the Williams' Property; and (3) the Actions of the City Council and the Developer's Own Decisions are the Legal and Proximate Cause of any Alleged Injury to the Developer"

To recover on an intentional interference with prospective economic relations claim, a Plaintiff must prove: (1) That the Defendant intentionally interfered with the Plaintiff's existing or potential economic relations; (2) for an improper purpose or by an improper means; (3) causing injury to the Plaintiff. *Leigh Furniture*, 657 P.2d at 304. The Developer bases its claim on intentional interference with prospective economic relations by alleging that Mrs. Tobias and Mrs. Feld somehow interfered with the "consummation of the [second] contract". Amended Complaint, ¶ 25 (R.153) However, it is undisputed that the second REPC was timely consummated exactly according to its terms.[9] (R. R. 3269, 3271-3273, 3283-3284)

Another fundamental undisputed dispositive fact requiring a summary judgment dismissal of the Developer's claim is that the Developer never purchased, and never intended to purchase, the Williams' property. (R. R. 3212-3213) The purchasers of the Williams' property were Lake View Farms, L.L.C., and Janice Phelps Andersen. It is also undisputed that the Developer was reimbursed for all of its costs incurred in the purchase of the Williams' property, including attorney's fees. (R. 3210; 3523-3527)

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[9]The Developer's pled theory was really a claim for interference with a contract because the pleadings referenced the then-existing Second REPC instead of any then-existing prospective economic relations. *See Leigh*, 657 P.2d at 301. (Comparing interference with a specific contract versus interference with prospective economic relations.)

Finally, the Developer's own testimony unequivocally demonstrated that Lake View Farms, L.L.C., and the Developer intentionally allowed the First REPC to expire because South Jordan had not approved the requested master plan and zoning change for the Williams' parcel by June 30, 1997. Accordingly, it is undisputed that the City's master plan and zoning decision, and the Developer's subsequent decision not to close the First REPC, were the legal cause of any purported damages by the Developer when it was "forced" to enter into the "less advantageous" second REPC. *Cf. Blank v. Kirwan*, 703 P.2d 58, 65 (Cal. 1985) (where there would have been no injury absent City Council's zoning decision governmental action was legal cause of plaintiff's injury and defendants were not liable). Consequently, the lower Court should have entered a summary judgment dismissing the Developer's pled claim for interference with economic relations, and erred when it failed to do so.

D. The Developer's Pled Claim for Interference with Economic Relations Should Have Been Dismissed Because it is Undisputed that During the Relevant Time Period – June 30, 1997 - November 24, 1997 – No Wrongful Interference Occurred

Improper interference means "interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself." *Mumford v. ITT Commercial Finance Corp.*, 858 P.2d 1041, 1043 (Utah App. 1993). This element is only satisfied when the means used to interfere with the parties' economic relations are contrary to law, such as violations of statutes, regulations, or recognized common-law rules. *Id.* at 1044. Telling a seller that his land has more value than a seller believes is not wrongful interference. *Id.* Those kinds of statements are regarded as mere expressions of opinion or trader talk involving matters of judgment, estimation as to which men may differ. *Wright v. Westside Nursery*, 787 P.2d 508, 512 (Utah App. 1990); *see also Davis v. Schiess*, 417 P.2d 19, 21 (Wyo. 1966) (protecting an expression of opinion as to value is not fraud). There is

absolutely nothing in the record suggesting that Mrs. Tobias and Mrs. Feld did not believe that the property was worth more than the Developer offered.

Similarly, any alleged statement that Mrs. Tobias and Mrs. Feld could obtain a better buyer is not a wrongful misrepresentation for three reasons. First, it is only puffing. *Cf. Detroit Vapor Stove v. J.C. Weeter Lumber Co.*, 61 Utah 503, 503, 215 P. 995, 995 (1923) (seller's representation that products "will sell like hotcakes"). Second, an unfilled promise of future performance is not actionable or a wrongful misstatement unless the complaining party can prove that at the time the promise was made, there was no intent to perform. *See, e.g. Von Hake v. Thomas*, 705 P.2d 766 (Utah 1985); *Schow v. Guardtone*, 417 P.2d 643 (Utah 1966).

Additionally, it is undisputed that the Developer and Williams did not have a contract to purchase the Williams' property between June 30, 1997 when the First REPC expired, and November 25, 1997 when the second REPC was executed. During this period of time, the Williams family continued to negotiate with the Developer, but also entertained overtures from other interested persons. (R. 3230; 3277-3281;3287-3291; 3514; 3529-3533) The Williams family never terminated their discussions with the Developer or refused to deal with the Developer (R. 3290-3291; 3529). In the lower Court proceeding, the Developer wholly failed to explain why actions taken by Mrs. Tobias and Mrs. Feld during this period were wrongful. *Soter v. Wasatch Dev. Corp.*, 443 P.2d 663 (Utah 1968) (wrongful interference with contract claim properly dismissed where seller negotiated directly with the buyer's prospective purchaser after contract expired).

The Developer's gripe boils down to the fact that the Developer and Lake View Farms, L.L.C., made the business decision not to close on the first REPC. They went back and made a new deal with Mr. Williams – a self-proclaimed experienced "horsetrader" (R. 3279-3280), who knew he had leverage because the Developer wanted the property for the

office project. Mr. Williams received expressions of interest from other parties not controlled by Mrs. Tobias or Mrs. Feld, used those expressions of interest to justify increasing the price, and was assisted by an attorney in his negotiations with the Developer. Mr. Williams' successful negotiating strategy cannot be blamed on Mrs. Tobias and Mrs. Feld.

These undisputed dispositive facts unequivocally demonstrate that the Developer cannot demonstrate that the Williams' decisions occurred in a vacuum where they were influenced solely by the alleged actions of Mrs. Tobias and Mrs. Feld. The Developer basically asks the judicial system to save it from the "inevitable by-product of competition" that resulted from a business decision not to close the First REPC. *Cf. Leigh Furniture*,657 P.2d at 307. The lower Court should have declined to rescue the Developer from its own business decisions that turned out in hindsight to be mistakes. *Cf. Bekins Bar V Ranch v. Huth*, 664 P.2d 455, 459 (Utah 1983) (persons dealing at arm's length are entitled to contract on their own terms without the intervention of the courts to relieve a party from the effects of a bad bargain).

E. The Developer's Unpled Claim for Intentional Interference Should be Dismissed Because the Conduct the Developer Complains About is Protected and Privileged by the First Amendment, the Noerr-Pennington Doctrine, and the Citizen in Government Participation Act

The First Amendment guarantees "the right of the people to petition the government for a redress of grievances." Citizen access to the institution of government is one of the foundations on which our form of government is premised. Accordingly, the right to petition has been characterized as one of the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Illinois State Bar Ass'n,* 389 U.S. 217, 222 (1967).

Although never pled by the Developer, in the summary judgment proceedings below, the Developer claimed that Mrs. Tobias and Mrs. Feld were somehow successful in persuading City officials to delay the master plan and zoning change the Developer needed

to develop the Williams' parcel; the first REPC expired before the changes were adopted, and that because of the delay, the Developer was forced to enter into the Second REPC that required the Developer to pay the Williams more for the Williams property. The fundamental flaw in the Developer's unpled legal theory is that Mrs. Tobias and Mrs. Feld's efforts to oppose riverbottom development before City decision makers is privileged by the First and Fourteenth Amendments. "[T]he First Amendment protects expressions designed to influence government action, even though the content of those expressions brings incidental injury to parties concerned." *Searle v. Johnson (Searle I)*, 646 P.2d 682) (Utah 1982). "The right to petition is of such importance that it is not an improper interference with prospective economic advantage. . . ." *Searle v. Johnson (Searle II)*, 709 P.2d 328, 330 (Utah 1985) (citing *Missouri v. Nat'l Org. for Women, Inc.*, 620 F.2d 1301, 1316 (8th Cir. 1980))

Likewise, the *Noerr-Pennington* doctrine "creates an immunity from suit which allows citizens to petition public officials to take certain actions or enact certain provisions." *Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523, 526 (N.D. Ill. 1990) (petitioning local officials to vacate a street as a public roadway was absolutely privileged under the First Amendment and *Noerr-Pennington doctrine*). "The exercise of this right shall be vigorously protected and should not expose individuals to suit by persons unhappy with results of such petitioning". *Id.* "The clear import of the *Noerr-Pennington doctrine* is to immunize from legal action persons who attempt to induce the passage or enforcement of law or to solicit governmental action, even though the result of such activity may indirectly cause injury to others." *Webb v. Fury*, 282 S.E. 2d 28, 35 (W. Va. 1981).

Noerr-Pennington has been applied to the First Amendment right to petition in a variety of actions including actions for tortious interference with business relationships. *See e.g., Havoco of America Ltd. v. Hollowbow*, 702 F.2d 643, 650 (7th Cir. 1983) (petitioning

activity was privileged and could not form the basis of a claim for tortious interference with business relationship); *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 551 (5th Cir. 1978) (petitioning activity protected from state law liability for interference with business relationship); *Sierra Club v. Butz*, 349 F.2d 934, 939 (N.D. Cal. 1972) (petitioning government to preserve wilderness quality of area protected by First Amendment right to petition).

If there ever was a question as to whether Mrs. Tobias and Mrs. Feld's conduct was protected by *Noerr-Pennington* and the First Amendment, that question was resolved in *City of Columbus v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991). The United States Supreme Court ruled as irrelevant the fact that a private party's political motives are selfish because the petition clause "shields a concerted effort to influence public officials regardless of intent or purpose." *Id.* at 380. Thus a dismissal of a SLAPP suit should be granted in all cases in which the target is seeking a governmental result, regardless of the target's motive is impure or the target uses improper means. *See id.*

In summary, Mrs. Tobias' and Mrs. Feld's efforts to preserve the riverbottom lands are protected by the First Amendment and *Noerr-Pennington doctrine*. This protection is especially appropriate where as here, Mrs. Tobias and Mrs. Feld sought to accomplish the political goal of preserving open space. *See Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 535, n.3 (9th Cir. 1991).

The question of whether Mrs. Tobias' and Mrs. Feld's conduct is privileged was also resolved by the Legislature when it passed the Citizen Participation in Government Act. The Act imposes liability on the Developer for compensatory damages upon a demonstration that an action against citizens participating in the process of government, was commenced or continued "for the purpose of harassing, intimidating, punishing, or otherwise maliciously

inhibiting the free exercise of the rights granted under the First Amendment to the U.S. Constitution." Utah Code Ann. § 78-58-105(b).

F. Mrs. Tobias' and Mrs. Feld's Motion for Summary Judgment Should Have Been Granted Because the Developer Failed to Contradict Mrs. Feld's and Mrs. Tobias' Statement of Facts as Required by Rule 4-501 then in Effect

There is also a fundamental procedural reason why a summary judgment should have been entered dismissing the Developer's SLAPP suit. At the time of the lower Court's proceedings, Rule 4-501(2)(B) of the Utah Rules of Judicial Administration plainly required:

> "[E]ach disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing parties' statement of facts."

Contrary to this plain and simple rule, the Developer failed to directly controvert a single fact in Mrs. Tobias' and Mrs. Feld's Memorandum in Support of their Motion for Summary Judgment. Instead, it argued that its own statement of facts "implicitly conflict[s] with the facts alleged by Mrs. Tobias and Mrs. Feld." R. 3721) Rule 4-501(2)(B) does not permit "implicit" contradictions. Stated another way, the lower Court should not have been allowed to guess at what was and was not a contested material fact.

Because the Developer failed to directly contradict Mrs. Tobias' and Mrs. Feld's statement of facts in accordance with Rule 4-501 (2)(B), all such facts should have been "deemed admitted" and Mrs. Tobias and Mrs. Feld's summary judgment motion dismissing the Developer's claims should have been granted.

CONCLUSION

That the SLAPP Act does not apply to a lawsuit continued for an improper purpose after the SLAPP Act went into effect, is contrary to the plain language of the statute. Likewise, the lower Court's conclusion that if a claim is correctly pled on its face, it survives

a SLAPP-Act challenge is also clearly wrong. The SLAPP Act mandates a factual inquiry on whether the lawsuit was brought to chill, harass or punish those who exercise their First Amendment right to speak out in governmental proceedings. Consequently, the summary judgment dismissing Mrs. Tobias' and Mrs. Feld's SLAPP Act claims should be reversed.

In addition, the lower Court's 12(b)(6) dismissal of Mrs. Tobias' and Mrs. Feld's claims for intentional and negligent infliction of emotional distress should be reversed because the correct legal conclusions require a different result. The lower Court's summary judgment dismissal of Mrs. Tobias' abuse of process claims also should be reversed because there is a genuine issue of material fact as to whether the Developer used the legal process for an improper purpose. In contrast, undisputed dispositive facts require the dismissal of the Developer's pled and unpled claims for intentional interference with contractual and/or economic relations.

For these reasons, the two lower interlocutory orders at issue should be reversed and the case remanded for trial on Mrs. Tobias' and Mrs. Feld's statutory and common-law SLAPP suit counterclaims.

DATED this 9 day of February, 2004.

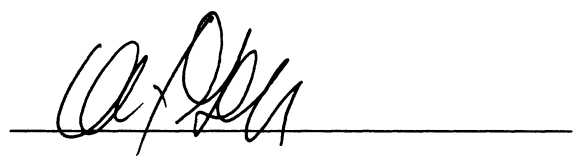
PARRY ANDERSON & GARDINER

Dale F. Gardiner
Attorney for Appellants

MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid, two (2) true and exact copies of the foregoing **Brief of Appellant** to the following party on the 9th day of February, 2004:

D. Miles Holman
Jeffrey N. Walker
Holman & Walker
9537 South 700 East
Sandy, UT 84070



ADDENDA

1. Determinative Statutes and Constitutional Provisions.
2. The two interlocutory orders at issue.
3. Developer's Proposed Settlement Agreement.
4. Developer's Amended Complaint.
5. Developer's letter December 13, 1996.
6. Ruling on Motions.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENTS I-X [BILL OF RIGHTS]
AMENDMENTS XI-XXVI

AMENDMENT I

[Religious and political freedom.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

PART IX

MISCELLANEOUS PROVISIONS

CHAPTER 58

CITIZEN PARTICIPATION IN GOVERNMENT ACT

78-58-101. Title.

This chapter is known as the "Citizen Participation in Government Act." 2001

78-58-102. Definitions.

As used in this chapter:

(1) "Action involving public participation in the process of government" means any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief to which this act applies.

(2) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority.

(3) "Moving party" means any person on whose behalf the motion is filed.

(4) "Person" means the same as defined in Section 68-3-12.

(5) "Process of government" means the mechanisms and procedures by which the legislative and executive branches of government make decisions, and the activities leading up to the decisions, including the exercise by a citizen of the right to influence those decisions under the First Amendment to the U.S. Constitution.

(6) "Responding party" means any person against whom the motion described in Section 78-58-103 is filed.

(7) "State" means the same as defined in Section 68-3-12. 2001

78-58-103. Applicability.

(1) A defendant in an action who believes that the action is primarily based on, relates to, or is in response to an act of the defendant while participating in the process of government and is done primarily to harass the defendant, may file:

(a) an answer supported by an affidavit of the defendant detailing his belief that the action is designed to prevent, interfere with, or chill public participation in the process of government, and specifying in detail the conduct asserted to be the participation in the process of government believed to give rise to the complaint; and

(b) a motion for judgment on the pleadings in accordance with the Utah Rules of Civil Procedure Rule 12(c).

(2) Affidavits detailing activity not adequately detailed in the answer may be filed with the motion. 2001

78-58-104. Procedures.

(1) On the filing of a motion for judgment on the pleadings:

(a) all discovery shall be stayed pending resolution of the motion unless the court orders otherwise;

(b) the trial court shall hear and determine the motion as expeditiously as possible with the moving party providing by clear and convincing evidence that the primary reason for the filing of the complaint was to interfere with the first amendment right of the defendant; and

(c) the moving party shall have a right to seek interlocutory appeal from a trial court order denying the motion or from a trial court failure to rule on the motion in expedited fashion.

(2) The court shall grant the motion and dismiss the action upon a finding that the primary purpose of the action is to prevent, interfere with, or chill the moving party's proper participation in the process of government.

(3) Any government body to which the moving party's acts were directed or the attorney general may intervene to defend or otherwise support the moving party. 2001

78-58-105. Counter actions — Attorney's fees — Damages.

(1) A defendant in an action involving public participation in the process of government may maintain an action, claim, cross-claim, or counterclaim to recover:

(a) costs and reasonable attorney's fees, upon a demonstration that the action involving public participation in the process of government was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law; and

(b) other compensatory damages upon an additional demonstration that the action involving public participation in the process of government was commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of rights granted under the First Amendment to the U.S. Constitution.

(2) Nothing in this section shall affect or preclude the right of any party to any recovery otherwise authorized by law. 2001

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CLERK OF THE DISTRICT COURT
SALT LAKE DEPARTMENT II

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ATTORNEYS FOR PLAINTIFF

IN THE THIRD JUDICIAL COURT FOR SALT LAKE COUNTY
STATE OF UTAH
Salt Lake Department, 450 South State Street, Salt Lake City, Utah 84111

ANDERSON DEVELOPMENT COMPANY, L.C., a Utah limited liability company **Plaintiff** **vs.** **JANALEE S. TOBIAS, an individual; JUDY FELD, an individual; SAVE OUR SOUTH JORDAN RIVER VALLEY, INC., a Utah Corporation, dba SOS and SAVE OPEN SPACES; BRENT FOUTZ, an individual; and JANE and JOHN DOES 1 through 19, inclusive** **Defendants**	**ORDER** **(Substituted)** **Re: (1) Motion For Summary Judgment Over Defendants Tobias and Feld's Counterclaim: SLAPP Suit Counterclaim - Utah Code Ann. §§ 78-53-101, et seq. (2001)** **(2) Motion to Dismiss the Counterclaim of Defendants Tobias and Feld** **Civil No. 980902813** **Judge Douglas L. Cornaby**

[This Order is in complete substitution of a previously submitted and signed Order over this same Motions reflected in this Order. The previously signed and entered Order should be and is hereby stricken and this Order should be and is hereby entered in its place.]

The following motions

1 Motion For Summary Judgment Over Defendants Tobias And Feld's Counterclaim SLAPP Suit Counterclaim - Utah Code Ann §§ 78-53-101, et seq (2001), and

2 Motion to Dismiss the Counterclaim of Defendants Tobias and Feld

having come on for hearing, on notice, on Monday the 27th day of January 2003, before the above entitled court, Honorable Douglas L Cornaby, Senior District Court Judge, presiding, with plaintiff Anderson Development, LC, appearing through its attorneys of record, D Miles Holman, Jeffrey N Walker and Peter C Schofield of the law firm of Holman & Walker, LC, defendants Janalee S Tobias and Judy Feld appearing in person and through their attorneys of record, Douglas J. Parry, Dale F Gardiner and Jennie B Garner of the law firm of Parry Anderson & Gardiner, and defendant Brent Foutz appearing in person *pro se*, and after a review of the submissions of the parties and after hearing oral argument and being fully informed in the circumstances and for good cause shown

IT IS HEREBY ORDERED (in substitution of a previously entered Order that contained errors) as follows

1. Plaintiff's Motion For Summary Judgment Over Defendants Tobias and Feld's SLAPP Suit Counterclaims based upon Utah Code Ann §§ 78-53-101, et seq (2001) should be and is hereby granted and judgment should be and is hereby entered to that effect. The First Claim for Relief (SLAPP Suit Counterclaim -- Utah Code Ann §§ 78-58-101, et seq) of the Counterclaim of Janalee S Tobias and Judy Feld should be and is hereby dismissed in full

2 Plaintiff's Motion to Dismiss the Counterclaim of Defendants Tobias and Feld to the extent that the claims are based upon theories other than SLAPP Suit theories of Utah Code Ann §§ 78-53-101, et seq (2001), should be and is hereby granted in part and denied in part as follows:

(a) Plaintiff's Motion to Dismiss the Counterclaim of Defendants Tobias and Feld with regard to the Second Claim for Relief (Abuse of Process) should be and is hereby denied.

(b) Plaintiff's Motion to Dismiss the Counterclaim of defendants Tobias and Feld with regard to the Third Claim for Relief (Wrongful Civil Proceedings) should be and is hereby granted and the Third Claim for Relief (Wrongful Civil Proceedings) should be and is hereby dismissed in full.

(c) Plaintiff's Motion to Dismiss the Counterclaim of defendants Tobias and Feld with regard to the Fourth Claim for Relief (Intentional Infliction of Emotional Distress) should be and is hereby granted and the Fourth Claim for Relief (Intentional Infliction of Emotional Distress) should be and is hereby dismissed in full.

(d) Plaintiff's Motion to Dismiss the Counterclaim of defendants Tobias and Feld with regard to the Fifth Claim for Relief (Negligent Infliction of Emotional Distress) should be and is hereby granted and the Fifth Claim for Relief (Negligent Infliction of Emotional Distress) should be and is hereby dismissed in full

(e) Plaintiff's Motion to Dismiss the Counterclaim of defendants Tobias and Feld with regard to the Sixth Claim for Relief (Punitive Damages) should be and is hereby granted and the Sixth Claim for Relief (Punitive Damages) should be and is hereby dismissed in full

(f) Plaintiff's Motion to Dismiss the Counterclaim of defendants Tobias and Feld with regard to the Seventh Claim for Relief (Attorney Fees for Filing of Meritless Claims

in Bad Faith) should be and is hereby denied

3 The oral motion made at the hearing by defendants Janalee S Tobias and Judy Feld to certify the matter for immediate appeal should be and is hereby denied

DATED this 15 day of May 2003

BY THE COURT

Honorable Douglas L. Cornaby
Senior District Court Judge

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.
DATE: 5/30/03
DEPUTY COURT CLERK

SALT LAKE CO. STATE OF UTAH DISTRICT COURT

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COUNTY
BY: COUNTY CLERK

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CLERK OF THE DISTRICT COURT
SALT LAKE DEPARTMENT II

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ATTORNEYS FOR PLAINTIFF

IN THE THIRD JUDICIAL COURT FOR SALT LAKE COUNTY

STATE OF UTAH

Salt Lake Dept., 450 South State Street, Salt Lake City, Utah 84111

ANDERSON DEVELOPMENT COMPANY, L.C., a Utah limited liability company **Plaintiff** **vs.** **JANALEE S. TOBIAS, an individual; JUDY FELD, an individual; SAVE OUR SOUTH JORDAN RIVER VALLEY, INC., a Utah Corporation, dba SOS and SAVE OPEN SPACES; BRENT FOUTZ, an individual; and JANE and JOHN DOES 1 through 19, inclusive** **Defendants**	**ORDER** Re: **(1) Plaintiff's Motion for Summary Judgment Over Defendants Tobias and Feld's Abuse of Process Counterclaim; and** **(2) Defendants Janalee S. Tobias and Judy Feld's Motion for Summary Judgment** **(3) Defendants' Motions to Strike Portions of Various Affidavits** Civil No. 980902813 Judge Douglas Cornaby

The following motions:

1. Plaintiff's Motion for Summary Judgment Over Defendants Tobias and Feld's Abuse of Process Counterclaim

2 Defendants Janalee S Tobias and Judy Feld's Motion for Summary Judgment,

3 Janalee S Tobias' and Judy Feld's Motion to Strike Portions of the Affidavit of Dorothy Williams [Motion submitted to the Court for ruling on the memoranda provided to the Court],

4 Janalee S Tobias' and Judy Feld's Motion to Strike Portions of the Affidavit of Cheri Johnson [Motion submitted to the Court for ruling on the memoranda provided to the Court],

5 Janalee S Tobias' and Judy Feld's Motion to Strike Portions of the Second Affidavit of Boyd G Williams [Motion submitted to the Court for ruling on the memoranda provided to the Court],

6 Janalee S Tobias' and Judy Feld's Motion to Strike Portions of the Affidavit of Thomas L Christensen [Motion submitted to the Court for ruling on the memoranda provided to the Court],

7 Janalee S Tobias' and Judy Feld's Motion to Strike Portions of the Affidavit of David Millheim [Motion submitted to the Court for ruling on the memoranda provided to the Court],

8. Janalee S Tobias' and Judy Feld's Motion to Strike Portions of the Affidavit of Gerald D Anderson [Motion submitted to the Court for ruling on the memoranda provided to the Court], and

9. Janalee S Tobias' and Judy Feld's Motion to Strike Portions of the Second Affidavit of Gerald D Anderson [Motion submitted to the Court for ruling on the memoranda provided to the Court]

having come on for hearing, on notice, on Monday the 30th day of June 2003, before the above entitled court, Honorable Douglas L Cornaby, Senior District Court Judge, presiding, with plaintiff Anderson Development Company, LC, appearing through its attorneys of record, D Miles Holman, Jeffrey N Walker and Peter C Schofield of the law firm of Holman & Walker, LC, defendants

Janalee S. Tobias and Judy Feld appearing in person and through their attorneys of record, Dale F. Gardiner and Craig R. Kleinman of the law firm of Parry Anderson & Gardiner, and defendant Brent Foutz appearing in person *pro se*, and after a review of the submissions of the parties and after hearing oral argument and being fully informed in the circumstances and the making of its written Ruling on the Motions and for good cause shown

IT IS HEREBY ORDERED as follows:

1. Defendants Tobias' and Feld's Motions to Strike (portions of affidavits of Dorothy Williams, Cheri Johnson, Boyd G. Williams, Thomas L. Christensen, David Millheim, Gerald D. Anderson) should be and are hereby granted and denied as follows:

(a) All paragraphs of the Affidavit of Dorothy Williams are admissible except:

- Paragraph 2 and the last two sentences of paragraph 6 which should be and are hereby stricken.

(b) All paragraphs of the Affidavit of Cheri Johnson are admissible except:

- Paragraph 3 and the last sentence of paragraph 6 which should be and are hereby stricken.

(c) All paragraphs of the Second Affidavit of Boyd G. Williams are admissible except:

- Paragraphs 12, 29 and 30, and also the phrase "Due to the delays encouraged by Janalee and Judy" contained in paragraph 24 should be and are hereby stricken.

(d) All paragraphs of the Affidavit of Thomas L. Christensen are admissible. Defendants Tobias' and Feld's Motion to Strike Portions of the Affidavit of Thomas L. Christensen should be and is hereby is denied.

(e) All paragraphs of the Affidavit of David Millheim are admissible except:

- Paragraphs 9 and 15 which should be and are hereby stricken.

(f) All paragraphs of the Affidavit of Gerald D. Anderson are admissible except:

- Paragraphs 16, 19 and 20 which should be and are hereby stricken.

(g) All paragraphs of the Second Affidavit of Gerald D. Anderson are admissible except:

- Paragraphs 9, 10, 11, 17, 18, 19, 20,21, 25, 26, 27, 28 and 29 which should be and are hereby stricken.

The motion for attorney's fees by plaintiff Anderson Development Co. regarding the Motions to Strike should be and is hereby denied.

2. Defendants Janalee S. Tobias and Judy Feld's Motion for Summary Judgment should be and is hereby denied inasmuch as the plaintiff Anderson Development Co. has set forth facts in the unobjectionable portions of the affidavits submitted to the Court sufficient to preclude summary judgment on the claim for intentional inference with economic relations.

3. The Motion for Summary Judgment Over Defendants Tobias and Feld's Abuse of Process Counterclaim should be and is hereby granted and the Second Claim for Relief (Abuse of

Process) of the Counterclaim of Defendants Tobias and Feld should be and is hereby dismissed, with prejudice, in full.

DATED this 25 day of July 2003.

BY THE COURT:

Honorable Douglas L. Cornaby
Senior District Court Judge

APPROVED AS TO FORM:

HOLMAN & WALKER, LC

BY: _____
Jeffrey N. Walker
D. Miles Holman
Peter C. Schofield
Attorneys for Plaintiff Anderson Development Company

PARRY ANDERSON & GARDINER

BY: _____
Douglas J. Parry
Dale F. Gardiner
Jennie B. Garner
Attorneys for Defendants Janalee Tobias and Judy Feld

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing **ORDER Re: (1) Motion for Summary Judgment Over Defendants Tobias and Feld's Abuse of Process Counterclaim, (2) Defendants Janalee S. Tobias and Judy Feld's Motion for Summary Judgment, (3) Motions to Strike Portions of Various Affidavits** upon all parties on this 23rd day of July 2003, by mailing a copy thereof, postage prepaid, to the following

Douglas J. Parry
Dale F Gardiner
PARRY ANDERSON & GARDINER
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111

Michael N Martinez
4479 Gordon Lane, #100
Murray, UT 84107

Brent Foutz
1320 East 500 South, Apt. 200
Salt Lake City, UT 84102

Honorable Douglas Cornaby
Senior District Court Judge
3612 North 2900 East
Layton, Utah 84040

CONFIDENTIAL SETTLEMENT AGREEMENT

THIS CONFIDENTIAL SETTLEMENT AGREEMENT (the "Settlement") is entered into this ____ day of April, 1999, by and between Anderson Development Company, LC, a Utah limited liability company ("Anderson Development") and Gerald A. Anderson (collectively referred to as "ADC") and Janalee Tobias, Judy Feld, Brent Foutz, Drew Chamberlain and Save Our South Jordan River Valley, Inc., a Utah corporation, dba Save Open Spaces or SOS (collectively referred to as "SOS"), and their respective counsel (ADC, SOS and their counsel shall be referred to individually as a "Party" or collectively as the "Parties").

RECITALS

WHEREAS, Anderson Development filed that certain action entitled Anderson Development Company, LC v. Janalee S. Tobias, Judy Feld, Save Our South Jordan River Valley, Inc., and Does 1 through 99, in the Third District Court in and for Salt Lake County, State of Utah, Civil No.980510539 (the "Action");

WHEREAS, the Action involved disputes arising from ADC's involvement and SOS's opposition to the development of that certain real property development located west of the Jordan River in South Jordan City, Utah (the "Development"); and

WHEREAS, SOS has denied liability to Anderson Development or ADC, and

WHEREAS, the Parties desire to settle the controversies and claims existing between them from the Action or which could have been made in the Action and for a complete and final settlement of the claims that Anderson Development has made in the Action or which could have been made in the Action or that SOS could make against ADC or that ADC could make against SOS.

NOW, THEREFORE, in consideration of the promises set forth herein, and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, **IT IS HEREBY AGREED AS FOLLOWS:**

SECTION ONE

CONFIDENTIALITY

1.01. Scope of Confidentiality. The Parties agree that the entire content of the discussions, including all oral representations, written documents or otherwise, between the Parties as pertaining to this Settlement shall be and hereafter are to remain confidential, private and undisclosed, including, but not limited to the following: (1) any member of the press, including, but not limited to, print, television and radio media; (2) any judicial proceeding currently pending, threatened, whether known or unknown, whether suspected or unsuspected, whether accrued or unaccrued; or whether alleged or unclaimed; (3) any state, county, local, community or other public meeting; and (4) or any other individual or entity not specifically noted in paragraph 1.01.01, herein

1.01.01. The Parties agree that the terms of this Settlement have been, shall be and hereafter are to remain confidential, as noted in paragraph 1.01. above, except that they may disclose the terms of this Settlement to the following persons so long as each such person agrees in advance of any such disclosure to maintain this Settlement in the strictest confidence in accordance with the terms of this Settlement: (a) a Party's spouse; (b) a Party's attorneys who have prosecuted the Action, and any legal counsel otherwise involved in approving this Settlement; (c) any potential purchaser, partner, joint venturer or investor in the Development, or of any part therein, who inquires about the status of the Action; (d) a Party's accountant or other professional whose assistance is reasonably necessary in preparation of tax returns and other financial and business records; and (e) as required by law, rule, regulation or court order.

1.02. Enforcement of Confidentiality. In the event either Party or their counsel should breach this Settlement by disclosing the contents of the discussions or written documentation, as defined in Section One, above, the Parties agree that the breaching Party shall pay to the adverse Party the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) as liquidated damages.

SECTION TWO

MUTUAL RESTRAINING TERMS

2.01. Restraining by ADC. ADC, individually and collectively, agree to be restrained from the following activities for a period of four (4) years from the date of the Settlement:

2.01.01. From opposing or otherwise participating in discussion arising out of or relating to SOS' relationship with or involvement to the Development in any state, county, local, community or other public meetings, hearings, councils, committees, etc;

2.01.02. From encouraging or orchestrating any opposition arising out of or relating to SOS' relationship with or involvement to the Development in any state, county, local, community or other public meetings, hearings, councils, committees, etc;

2.01.03. From discussing with the media, including, but not limited to, print, television and radio media, any matters arising out of or relating to SOS;

2.01.04. From contacting any signatory of this Settlement associated with SOS;

2.01.05. From threatening or initiating law suits or any other governmental or regulatory actions against SOS arising out of or pertaining to the Development;

2.01.06. From threatening or initiating law suits or any other governmental or regulatory actions against any contractors, employees or agents of SOS arising out of or pertaining to the Development;

2.02. Restraining by SOS. SOS, individually and collectively, agree to be restrained from the following activities for a period of four (4) years from the date of the Settlement:

2.02.01. From opposing or otherwise participating in discussion or comment arising out of or relating to the Development in any state, county, local, community or other public meetings, hearings, councils, committees, etc;

2.02.02. From encouraging, soliciting or orchestrating any participation arising out of or relating to the Development in any state, county, local, community or other public meetings, hearings, councils, committees, etc;

2.02.03. From discussing with the media, including, but not limited to, print, television and radio media, any matters arising out of or relating to the Development;

2.02.04. From contacting Boyd and Dorothy Williams in any manner arising out of or relating to the Development;

2.02.05. From threatening or initiating law suits, ethical complaints or any other governmental or regulatory action against ADC arising out of or pertaining to the Development;

2.02.06. From threatening or initiating law suits, ethical complaint, or any other governmental or regulatory action against any contractors, employees or agents of ADC arising out of or pertaining to the Development;

2.02.07. From threatening or initiating law suits, ethical complaint or any other governmental or regulatory action against any governmental body, agency or officer, employee or agent thereof arising out of or pertaining to the Development;

SECTION THREE

MUTUAL RELEASES

3.01. **Release of SOS.** Conditioned upon SOS's fulfillment of and adherence to their obligations as set forth in this Settlement, ADC hereby release, acquit and forever discharge SOS and their respective heirs, executors, administrators, personal representatives, assigns, predecessors, successors, parents, subsidiaries, affiliates, partners, shareholders, directors, officers, servants, employees, attorneys, affiliates, and insurers from and of any and all actions, causes of action, claims, demands, rights, damages, costs, expenses, compensation and liabilities of any kind or nature whatsoever (whether at law or in equity; whether known or unknown; whether suspected or unsuspected; whether accrued or unaccrued; or whether alleged or unclaimed) for, on account of, or in any way arising out of any event of any nature whatsoever arising from or related to any incident or event asserted or assertable in the Action.

3.01.01. Upon the execution of this Settlement, ADC will caused to be filed the requisite pleadings with the appropriate court dismissing the Action, subject only to SOS' compliance with this Settlement.

3.02. **Release of ADC.** Conditioned upon ADC's fulfillment of and adherence to their obligations as set forth in this Settlement, SOS hereby release, acquit and forever discharge ADC and their respective heirs, executors, administrators, personal representatives, assigns, predecessors, successors,

parents, subsidiaries, affiliates, partners, shareholders, directors, officers, servants, employees, attorneys, affiliates, and insurers from and of any and all actions, causes of action, claims, demands, rights, damages, costs, expenses, compensation and liabilities of any kind or nature whatsoever (whether at law or in equity; whether known or unknown; whether suspected or unsuspected; whether accrued or unaccrued; or whether alleged or unclaimed) for, on account of, or in any way arising out of any event of any nature whatsoever arising from or related to any incident or event asserted or assertable in the Action.

SECTION FOUR

WARRANTIES AND COVENANTS

4.01. ADC's Warranties and Covenants. ADC warrant and covenant with SOS and each of them, as follows:

4.01.02. ADC warrant that they have not and will not assign to any person or Party any claim or matter within the scope of the release contained herein;

4.01.02. ADC covenant and agree never, individually or with any other person or in any way, to make, file, otherwise commence, aid in any way, prosecute, cause or permit to be commenced or prosecuted against SOS, or any of them, any claim, demand, cause of action, obligation, damage or liability which is the subject of the Action and/or release, except as provided in this Settlement. ADC is not prevented by this Settlement, however, from replying, responding, or testifying pursuant to a subpoena or other legal process;

4.01.03. ADC agree to indemnify and hold SOS, and each of them, harmless from and against any and all claims, demands, damages, and other costs and fees, including, without limitation, court costs and attorneys fees, arising from or connected with any claim, action or other proceeding made, brought by or prosecuted by ADC, either heretofore, now, or in the future, contrary to the provisions of this Settlement. ADC further agrees that this Settlement shall be deemed breached and a cause of action accrued thereon immediately upon the commencement of any such action contrary to the terms of this Settlement, and in any action this Settlement may be pleaded by SOS as an affirmative claim for relief, a defense, a counterclaim, a cross claim or a third-party complaint; and

4.01.04. ADC understand and agree that there may be claims and damages with respect to matters released herein, the existence of which and the consequences of which are presently unknown, but which may become known in the future, and which if known at present may have materially affected ADC's decision to enter into this Settlement. ADC do, nevertheless, intend to and does hereby release SOS, and each of them, from any and all such claims for any and all injuries and damages, whether known or unknown, whether now in existence or hereinafter to arise, and whether if known at present such claims may have materially affected ADC's decision to execute this Settlement.

4.02. SOS' Warranties and Covenants. SOS, and each of them, warrant and covenant to the ADC as follows:

4.02.01. SOS warrant that they are the sole holders and owners of the claims and matters released herein; that no other person or entity has any interest in the claims and matters released

pursuant to this Settlement, and that they have not and will not assign to any person or party any claim or matter within the scope of the release contained herein;

4.02.02. SOS covenant and agree never, individually or with any other person or in any way, to make, file, otherwise commence, aid in any way, prosecute, cause or permit to be commenced or prosecuted against ADC, or any of them, any claim, demand, cause of action, obligation, damage or liability which is the subject of the Action or counterclaim and/or release, except as provided in this Settlement. SOS is not prevented by this Settlement, however, from replying, responding, or testifying pursuant to a subpoena or other legal process;

4.02.03. SOS agree to indemnify and hold ADC harmless from and against any and all claims, demands, damages, and other costs and fees, including, without limitation, court costs and attorneys fees, arising from or connected with any claim, action or other proceeding made, brought by or prosecuted by SOS, either heretofore, now, or in the future, contrary to the provisions of this Settlement. SOS further agree that this Settlement shall be deemed breached and a cause of action accrued thereon immediately upon the commencement of any such action contrary to the terms of this Settlement, and in any action this Settlement may be pleaded by SOS as an affirmative claim for relief, a defense, a counterclaim, a cross claim or a third-party complaint; and

4.02.04. SOS understand and agree that there may be claims and damages with respect to matters released herein, the existence of which and the consequences of which are presently unknown, but which may become known in the future, and which if known at present may have materially affected SOS' decision to enter into this Settlement. SOS do, nevertheless, intend to and do hereby release ADC, and each of them, from any and all such claims for any and all injuries and damages, whether known or unknown, whether now in existence or hereinafter to arise, and whether if known at present such claims may have materially affected SOS' decision to execute this Settlement.

4.03. Mutual Covenants and Warranties of the Parties. The Parties, and each of them, covenant and warrant one to the other as follows:

4.03.01. The Parties to this Settlement agree and represent that they relied wholly upon their own judgment, belief and knowledge of the nature, extent and duration of the claims released herein, and that they have not been influenced to any extent whatsoever in making this Settlement by any representations or statements regarding damages, claims, or deficiencies, or regarding any other matters, made by any other party hereto, any person or persons representing them, or by any experts employed by them.

4.03.02. The Parties acknowledge, declare and agree that they have carefully read this Settlement, and all of its provisions, and have received and accepted the advice of their own independent counsel with respect thereto and enter into this Settlement freely and voluntarily and agree to be legally bound hereby.

4.03.03. Each of the Parties executing this Settlement, either for themselves individually or on behalf of one of the Parties hereby represents and warrants that they have the full capacity, right and authority to execute this Settlement, and that all procedures and approvals (including any necessary meetings, quorums, resolutions, or votes) that are necessary or required to enable them to properly execute

the Settlement and to bind themselves and the entities whom they represent in accordance with the terms hereof have been followed and/or secured.

4.03.04. All Parties hereby agree to cooperate fully to execute any and all supplementary documents, including dismissal of the Action and counterclaim, and to take any and all additional actions, that may be reasonably necessary or appropriate to give full force and effect to the terms and intent of this Settlement and to complete the documents required or contemplated hereby.

SECTION FIVE

ENFORCEMENT OF SETTLEMENT

5.01. Liquidated Damages for Breach. In the event either Party or their counsel should breach this Settlement, other than the provisions of Section One, above, the Parties agree that the breaching Party shall pay to the other Party the sum of ONE HUNDRED THOUSAND DOLLARS ($100,000.00) as liquidated damages for each breach.

5.02. Re-filing of Action for Breach. In the event that SOS or their counsel should breach this Settlement, other than the provisions of Section One, above, ADC may, at their sole discretion, re-file the claims alleged in the Action against SOS, and that all applicable statutes of limitations shall be waived as associated with said claims by SOS.

5.03. Attorneys' Fees and Costs. In any action brought to enforce, construe or seek damages for breach of this Settlement, or any document required hereby, the prevailing Party shall be entitled to recover its reasonable attorneys' fees, costs and expenses expended in such action in addition to any other monetary relief or other amount to which such Party is entitled, regardless of whether legal action is actually commenced or not. The amount recoverable includes, without limitation, the preparation of any complaints, answers, affirmative claims or defense, counterclaim, cross claim, or third-party complaint.

SECTION SIX

MISCELLANEOUS

6.01. Settlement of Disputed Claims. The Parties understand and agree that this Settlement is a compromise of disputed claims and that payment is not intended to be nor should it be construed as an admission of liability on the part of any Party released hereby, all of whom expressly deny liability.

6.02. Governing Law. This Settlement shall be governed by and construed in accordance with the laws of the State of Utah without reference to any conflicts of law provisions.

6.03. Severability. Any provision of this Settlement, or any portion of any such provision, that is deemed to be illegal and/or unenforceable shall be severed from the remainder of the provision in which it appears or the Settlement itself without affecting the validity of the remainder of the provision or the Settlement. In such event, all other provisions, or parts of provisions, of this Settlement shall remain in full force and effect.

6.04. Entire Settlement and Successors in Interest. This Settlement and the documents required hereby constitute the final written expression of all of the terms of the settlement of the claims of ADC against SOS and SOS against ADC in the Action and any related disputes between ADC and SOS, and it is a complete and exclusive statement of the terms of such settlement. Each of the Parties acknowledges that no representations or promises not expressly contained in this Settlement and the documents required hereby, have been made by any Party or the agents or representatives of any Party. Each of the Parties hereto further acknowledges and agrees that this Settlement and the documents required hereby, shall be binding upon and inure to the benefit of the executors, administrators, personal representatives, heirs, successors, and assigns of each Party hereto.

6.05. Waiver. The failure of any Party to enforce, at any time or for any period of time, any provision of this Settlement shall not be construed to be a waiver of such provision or the right of such Party thereafter to enforce such provision.

6.06. Counterparts. This Settlement and those documents contemplated herein may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document; notwithstanding, in due course, all original documentation shall be forwarded and each Party shall be provided with a fully executed original.

6.07. Heading. The paragraph headings appearing in this Settlement are inserted only as a matter of convenience and reference and in no way define, limit, construe or describe the scope or extent of such paragraph or in any way affect such paragraph.

6.08. Waiver of Defects. The Parties and their undersigned counsel stipulate and agree to waive any and all errors or defects which exist as of the date of this Settlement or which may be discovered hereafter.

6.09. Notices. All notices permitted or required under this Settlement shall be in writing and shall be delivered as follows with notice deemed given as indicated (i) by personal delivery when delivered personally, (ii) by overnight courier upon written verification of receipt, (iii) by telecopy or facsimile transmission when confirmed by telecopier or facsimile transmission, or (iv) br certified or registered mail, return receipt requested, three (3) days after deposit in the mail addressed as follows:

ADC: Jeffrey N. Walker
HOLMAN WALKER & HUTCHINGS
9537 South 700 East
Sandy, Utah 84070
Fax: (801) 990-4999

SOS: Ross C. Anderson
ANDERSON & KARRENBERG
50 W. Broadway
Salt Lake City, Utah 84111
Fax: (801) 364-7697

IN WITNESS WHEREOF, the Parties executed the Settlement on the date first written above.

ANDERSON DEVELOPMENT COMPANY, L.C., a Utah limited liability company

By_____
Its_____

Janalee Tobias

Judy Feld

SAVE OUR SOUTH JORDAN RIVER VALLEY, INC., a Utah corporation

By_____
Its_____

Gerald A. Anderson

HOLMAN WALKER & HUTCHINGS, LC, a Utah limited liability company

By_____
Its_____

Brent Foutz

Drew Chamberlian

ANDERSON & KARRENBERG, a Utah professional corporation

By_____
Its_____

Jeffrey N. Walker (USB #5556)
D. Miles Holman (USB #1524)
HOLMAN WALKER & HUTCHINGS, LC
9537 South 700 East
Sandy, Utah 84070
Telephone: (801) 990-4990

Attorneys for Plaintiff

IN THE THIRD JUDICIAL COURT FOR SALT LAKE COUNTY

STATE OF UTAH

ANDERSON DEVELOPMENT COMPANY, L.C., a Utah limited liability company, **Plaintiff,** **vs.** **JANALEE S. TOBIAS, an individual; JUDY FELD, an individual; SAVE OUR SOUTH JORDAN RIVER VALLEY, INC., a Utah corporation, dba SOS and SAVE OPEN SPACES; BRENT FOUTZ, an individual; and JANE and JOHN DOES 1 through 19, inclusive,** **Defendants.**	**AMENDED COMPLAINT** **Civil No. 980902813** **Judge Douglas Cornaby**

Plaintiff **ANDERSON DEVELOPMENT COMPANY, L.C.**, by and through its counsel of record, alleges as claims for relief against defendants as follows:

ORIGINAL

PARTIES

1. Plaintiff Anderson Development Company, L.C. ("Anderson Development"), is a Utah limited liability company with its principal place of business in Salt Lake County, State of Utah. The sole owners of Anderson Development are Gerald Anderson and Lynne Anderson.

2. Defendant Save Our South Jordan River Valley, Inc. is a Utah corporation organized on or about June 11, 1997, and conducting business under the names of SOS and at other times under a second business name of Save Open Space. This defendant has its principal place of business in Salt Lake County, State of Utah. Said defendant shall hereinafter be referred to as SOS.

3. Defendant Janalee S. Tobias ("Tobias") is a resident of the Salt Lake County, State of Utah and is an agent of, partner with or employed by SOS or is acting on her own accord.

4. Defendant Judy Feld ("Feld") is a resident of the Salt Lake County, State of Utah and is an agent of, partner with or employed by SOS or is acting on her own accord.

5. Defendant Brent Foutz ("Foutz") is a resident of Salt Lake County, State of Utah and is an agent of, partner with or employed by SOS or is acting on his own accord.

6. Defendants Jane and John Does 1 through 19 are agents of, partners with or employees of SOS or others acting in their own accord. SOS, Tobias, Feld, Foutz, Jane and John Does 1 through 19 are sometimes hereafter collectively referred to as SOS. Anderson Development

intends to amend the complaint with the true names of the Jane and John Does as they are discovered through the course of discovery.

JURISDICTION AND VENUE

7. This court has original jurisdiction of this action pursuant to the provisions of Utah Code Ann. §78-3-4 (1953, as amended).

8. Venue is proper in this court pursuant to the provisions of Utah Code Ann. §§78-13-1 and 78-13-7 (1953, as amended).

PRELIMINARY STATEMENT

9. This complaint is filed solely for the purpose to stop the wrongful conduct, as alleged herein, by SOS of interfering with contractual and economic relationships of Anderson Development. It is not the intention of Anderson Development, as alleged by Tobias, Feld and Foutz in public statements and by their attorney, as reported in the press, that anything in this complaint is designed to intimidate, restrain, chill or influence SOS's political or community activities or their exercise of First Amendment rights of freedom of speech pertaining to the development of any real property noted herein. This complaint addresses only wrongful conduct by SOS and others against Anderson Development's contractual and economic relationships.

BACKGROUND FACTS

10. In or about 1996, Anderson Development entered into a series of earnest money contracts to purchase certain adjoining properties west of the Jordan River and south of 106th South

Street in South Jordan City, Utah from various landowners including Robert Schmidt, Pat Forrest, Cal Robbins, Thomas K. Edmunds and Boyd and Dorothy Williams (collectively as the "Land Owners").

11. On or about October 28, 1996, an earnest money contract for the purchase of that certain real property consisting of approximately 30 acres located west of the Jordan River and south of 106th South Street in South Jordan City, Utah (the "Subject Property") was entered into between Anderson Development and Boyd and Dorothy Williams (the "Williams").

12. Beginning in or about November 1996, Tobias, Feld and Foutz began contacting the Land Owners in an attempt to induce them not to honor their earnest money contracts with Anderson Development.

13. These concerted efforts to intentionally interfere with Anderson Development's contractual rights by Tobias, Feld and Foutz were violative of the law.

14. In a letter dated December 13, 1996, a copy of which is attached hereto as Exhibit "A" and incorporated herein by this reference, Anderson Development warned SOS in writing about SOS's intentional and unlawful efforts to interfere with Anderson Development's contractual relationship with the Land Owners.

15. Subsequently, SOS continued a course of conduct to intentionally interfere with Anderson Development's contractual relationships with the Land Owners. These efforts continued to be focused at attempting to induce the Land Owners to not honor their contractual obligations to

Anderson Development and rather to sell their properties to SOS and other prospective buyers arranged by SOS.

16. During this same time SOS made affirmative representations to Williams and others that SOS had located willing and able buyers for the Subject Property for more than Anderson Development was offering. These representations were false and known to be false by SOS when made. These representations were made not for the purpose of providing Williams with an alternative buyer for the Subject Property, but rather for the improper purpose of injuring Anderson Development.

17. SOS continued to contact Williams for the purpose of attempting to persuade them to not honor their contractual relations with Anderson Development and to not sell the Subject Property to Anderson Development, including, but not limited to, attempting to persuade Williams that because Williams had not yet transferred the deed to the Subject Property to Anderson Development that he could still decide to sell to someone else.

18. On or about November 24, 1997, Anderson Development and the Williams Charitable Trust, Boyd G. Williams and Dorothy D. Williams, trustees ("Williams"), entered into another Real Estate Purchase Contract (the "Contract") containing terms less advantageous than previously obtained as a direct result of the misrepresentations made by SOS alleged herein.

19. On or about January 29, 1998, Tobias contacted the Williams again and requested that the Williams not honor the Contract with Anderson Development, but rather sell the Subject Property to another buyer arranged for by Tobias and SOS.

20. The next day, on or about January 30, 1998, the other prospective buyer under the direction of SOS contacted the Williams and offered to purchase the Subject Property, despite the fact that Williams had already contracted to sell the Subject Property to Anderson Development and SOS were aware of said contract.

21. As late as March 11, 1998, Tobias contacted Williams for the purpose of influencing their recollections as to the events surrounding SOS's prior wrongful interference with William's contractual and economic relationship with Anderson Development.

22. SOS has also engaged in a concerted course of conduct to misrepresent itself as a credible and legitimate charitable environmental entity, evidenced by, but not limited to the following conduct:

a. Misrepresenting to the public that it is an environmental organization interested in the Jordan River Valley preservation of open spaces, when in fact, it has shown no interest in preserving any other open space other than that in which Anderson Development has an ownership interest. The sole object of SOS has been to damage Anderson Development and intentionally interfere with Anderson Development's efforts to obtain the highest and best use of its properties in the South Jordan City area.

b. Misrepresenting to the public that it is a recognized tax-exempt entity.

c. Misrepresenting that it had raised hundreds of thousands of dollars for the protection of open spaces in South Jordan City, Utah.

d. Misrepresenting and inducing elementary school officials in the Jordan School District to politicize school children by requiring them to distribute flyers to homes in South Jordan City. This was in direct violation of the Jordan School District's policies. See Exhibit "B" attached hereto and incorporated herein by this reference.

23. Based on information and belief, SOS is not a credible or legitimate organization organized for the general preservation of open spaces, evidenced by, but not limited to the following factors:

a. SOS had not qualified as a tax-exempt entity under applicable sections of the Internal Revenue Code.

b. The donations received by SOS are not tax deducted by its donees, thereby potentially causing these donees to improperly and unlawfully file tax returns that evidence taking these donations.

c. SOS had failed to register with the State of Utah as required under the Charitable Solicitation Act, Utah Code Ann. §§13-22-1, et seq. (1997), to which no exemption applies.

d. SOS's failure to register with the State of Utah as required under the Charitable Solicitation Act, resulted in the public being unable to verify, including, but not limited to the relevant information pertaining to the operations, purpose and structure of the entity as follows:

i. The names and addresses of SOS's officers and directors.

ii. The purpose of the solicitations by SOS.

iii. The use of the contributions by SOS.

iv. The methods of solicitations, including the length of time the solicitation will be conducted by SOS.

v. The anticipated expenses of the solicitation, including all commissions, costs, salaries, etc., of SOS.

vi. A statement as to what percentage of the contributions collected as a result of solicitation are projected to be available for the application of charitable purposes by SOS.

vii. Identification of any professional fund raisers involved in any solicitation by SOS.

viii. Disclosure of any injunction, judgment or administrative order or conviction of any crime involving moral turpitude with respect to any officer, director, manager, operator or principal of SOS.

e. SOS failed to provide financial reports to the State of Utah as required under the Charitable Solicitation Act, Utah Code Ann. §§13-22-1, et seq. (1997), to which no exemption applies.

f. SOS failed to provide financial reports to the State of Utah as required under the Charitable Solicitation Act, which has resulted in the public being unable to verify, including, but not limited to the following relevant information pertaining to the operations, purpose and structure of the entity:

i. The gross amount of contributions received by SOS.

ii. The amount of contributions disbursed or to be disbursed to each charitable purpose designated in the registration by SOS.

iii. The amount paid to any professional fund raiser by SOS.

iv. The amounts spent for overhead, expenses, commission and similar purposes by SOS.

v. The name and address of any paid solicitor used by SOS.

g. SOS's failure to either register or provide financial reports with and to the State of Utah as required under the Charitable Solicitation Act, Utah Code Ann. §§13-22-1, et seq. (1997), to which no exemption applies, may subject it to the following cumulative fines, penalties and court orders:

i. A civil fine of up to $500 per violation and up to $10,000 for these series of violations, as enumerated above, against SOS.

ii. An injunction preventing SOS from further fund raising activities.

iii. The appointment of a receiver to operate SOS.

iv. Disgorgement of all monies received by SOS.

v. Conviction of a Class B misdemeanor by the directors, officers or managers of SOS - each day the violation continues constituting a separate punishable offense.

h. SOS failed to report to the State of Utah as required under the Election Code, Campaign and Financial Reporting Requirement, Campaign Financial Reporting by Corporation (the "Campaign Reporting Requirements"), Utah Code Ann. §§20A-11-701, et seq. (1997), as a result of its expenditures for political purposes, as noted herein, to which no exemption applies.

i. SOS's failure to report to the State of Utah as required under the Campaign Reporting Requirements, further resulted in Anderson Development and the public being unable to verify, including, but not limited to the following relevant information pertaining to the operations, purpose and structure of SOS:

i. The names and addresses of each entity that received more than $50 from SOS.

ii. The amount spent on any political issue in excess of $50 by SOS.

iii. The total amount of political issue expenditures by SOS.

iv. A verification of the accuracy of the information to be provided under subparagraphs i through iv, by SOS's treasurer or chief financial officer.

j. SOS's failure to report to the State of Utah as required under the Campaign Reporting Requirements, may subject it to a conviction of a Class B misdemeanor.

k. SOS has also failed to file any doing business filings, as required by law, with the State of Utah to conduct its business or operations under the dba of either SOS or Save Open Space.

FIRST CLAIM FOR RELIEF
(Intentional Interference with Prospective Economic Relations)

24. Anderson Development incorporates by reference the allegations contained in paragraphs 1 through 23, as though set forth fully herein.

25. SOS has intentionally, willfully, recklessly and maliciously interfered with Anderson Development's potential economic relations with Williams in the consummation of the Contract for the purchase of the Subject Property as a necessary part of the Development.

26. SOS's interference with Anderson Development's potential economic relations with Williams in the consummation of the Contract for the purchase of the Subject Property as a necessary part of the Development by improper means, evidenced by its misrepresentations, as delineated above, which representations are false, as specified above. These improper means evidence that SOS's ill will predominates over any legitimate economic motivation. Furthermore,

SOS's means of interference are contrary to and in violation of applicable statutory and regulatory law, as noted above.

27. Based on SOS's interference with Anderson Development's existing and potential economic relations, Anderson Development has been damaged in an amount to be established at trial.

WHEREFORE, Anderson Development demands judgment against SOS, jointly and separately, as set forth herein in plaintiff's Prayer for Relief.

SECOND CLAIM FOR RELIEF
(Intentional Interference with Existing Contractual Relations)

28. Anderson Development incorporates by reference the allegations contained in paragraphs 1 through 27, as though set forth fully herein.

29. Anderson and Williams entered into the Contract for the sale of the Subject Property.

30. The Subject Property is a critical part of the Development.

31. SOS opposes the Development.

32. To further SOS's goal of preventing the Development, SOS has wilfully and recklessly contacted Williams in attempts to induce Williams to not sell the Subject Property to Anderson Development, thereby causing injury to Anderson Development. These efforts included, but are not limited to, the following:

a. Misrepresenting to Williams that it is a credible and legitimate public charity involved in the general preservation of open spaces and that based on its expertise and strength that it could assist Williams in not selling the Subject Property to Anderson Development;

b. Misrepresenting to Williams and others that SOS had located willing and able buyers for the Subject Property for more than Anderson Development was offering not for the purpose of providing Williams with an alternative buyer for the Subject Property, but rather for the improper purpose of injuring Anderson Development; and

c. Misrepresenting to Williams that because Williams had not yet transferred the deed to the Subject Property to Anderson Development that they could still decide to sell to someone else.

33. These efforts by SOS, as noted in paragraph 31, has resulted in Anderson Development contacting SOS and demanding that it stop interfering with the contractual relationship it has with Williams, thereby causing injury to Anderson Development. SOS refused and continues to refuse to stop such unlawful conduct.

34. Based on SOS's interference with the present contractual relationship between Williams and Anderson Development, Anderson Development has been injured in an amount to be proven at trial.

WHEREFORE, Anderson Development demands judgment against SOS, jointly and separately, as set forth herein in plaintiff's Prayer for Relief.

THIRD CLAIM FOR RELIEF
(Injunctive Relief)

35. Anderson Development realleges and incorporates herein paragraphs 1 through 34 as though set forth fully herein.

36. Anderson Development will suffer immediate and irreparable injury, loss and damage if SOS is not immediately restrained from interfering with Anderson Development's present contractual relationship with Williams, as well as its prospective economic relations over the Development, as described above.

37. Pursuant to Rule 65 of the Utah Rules of Civil Procedure, Anderson Development respectfully requests the court to grant Anderson Development a preliminary and permanent injunction to prohibit SOS from interfering with Anderson Development's present contractual relationship with Williams, as well as its prospective economic relations over the Development, as described above.

WHEREFORE, Anderson Development demands judgment against SOS, jointly and separately, as set forth herein in plaintiff's Prayer for Relief.

PRAYER FOR RELIEF

WHEREFORE, Anderson Development prays for the following relief:

1. On the First Claim for Relief for intentional interference with prospective economic relations, as follows:

a. For actual damages in the amount in excess of One Hundred Thousand Dollars ($100,000), as proven at trial;

b. For punitive damages based on the willful and reckless conduct of SOS in an amount in excess of Five Hundred Thousand Dollars ($500,000);

c. For all expenses and costs of suit, including reasonable attorneys' fees; and

d. For such other and further relief as the court deems equitable and just in the circumstances.

2. On the Second Claim for Relief for intentional interference with existing contractual relations, as follows:

a. For actual damages in the amount in excess of One Hundred Thousand Dollars ($100,000), as proven at trial;

b. For punitive damages based on the willful and reckless conduct of SOS in an amount in excess of Five Hundred Thousand Dollars ($500,000);

c. For all expenses and costs of suit, including reasonable attorneys' fees; and

d. For such other and further relief as the court deems equitable and just in the circumstances.

3. On the Third Claim for Relief for a preliminary and permanent injunction prohibiting SOS from interfering with Anderson Development's present contractual relationship with Williams,

as well as its prospective economic relations over the Development, until this matter is resolved in this court.

DATED this 8th day of June 1999.

HOLMAN WALKER & HUTCHINGS

By _____
Jeffrey N. Walker
Attorneys for Plaintiff

Plaintiff's Address:
10977 Pleasant Hill Circle
Sandy, UT 84092

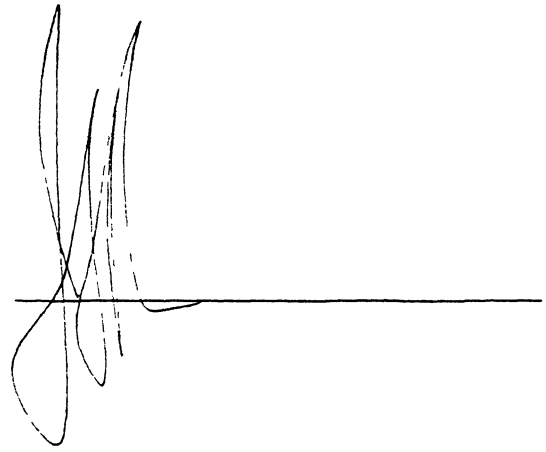
CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of June 1999, I mailed, postage pre-paid, a true and correct copy of the foregoing **AMENDED COMPLAINT** to the following:

Janalee S. Tobias
1230 Jordan River Drive
South Jordan, UT 84095

Judy Feld
1067 W. Ridgetop Cove
South Jordan, UT 84095

Save Open Space
c/o Janalee S. Tobias
1230 Jordan River Drive
South Jordan, UT 84095



ANDERSON DEVELOPMENT, L.C.

Friday, December 13, 1996

Ms. JanaLee Tobias
1238 Jordan River Dr.
South Jordan, Utah 84095

Ms. Judy Feld
1067 W. Ridgetop Cove
South Jordan, Utah 84095

and Members of SOS

Re: intentional interference with contractual relations

Dear Ms. Tobias and Ms. Feld and members of SOS,

We are very concerned with your conduct during the past few weeks which clearly constitutes an intentional effort to interfere with our contractual relationship with the Williams, Edmunds, Robbins, Forrest and Schmidt families. Utah law prohibits any intentional efforts by third parties to induce or otherwise cause a party to a contract not to perform the contract. See Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293 at 301 (Utah 1982); Restatement (Second) of Torts 766 (1979) and American Airlines v. Platinum World Travel, 769 F. Supp. 1203 (D. Utah 1990), aff'd 967 R.2d 410 (10th Cir. 1992). I suggest that you contact your attorney to verify the truth of these statements of law.

I will review some of the your activities that concern us: repeatedly speaking directly with the landowners and asking them not to honor their contracts to sell their properties to Anderson Development; inviting landowners to meetings specifically designed to induce them from honoring their contacts; offering to buy the land from the landowners; involving Congressman-elect Cook in an effort to personally ask landowners not to honor their contracts and to bring pressure upon them; contracting the news media to bring public pressure and publicity upon the landowners in an effort to cause them to not honor their contracts; asking South Jordan City officials to violate our due process right to a decision on our application for masterplan and zoning so that options on the properties would expire and that you would have more time to raise money to attempt to purchase the land yourselves; communicating incorrect and incomplete information about the project in an effort to bring public and governmental pressure upon the landowners not to honor the contracts. This list contains some of our concerns. We are also concerned that there may be other legally improper activities that we do not yet know about that may also constitute violations of our rights.

We have always been willing to meet with you and we still stand willing to discuss your concerns about this project. However, after the Planning Commission hearing on November 20, we

extended an offer to meet with you and discuss your concerns. Your response was, "We do not want to meet with you, we want to fight you." Last week we were contacted by both Kay Edmunds and Boyd Williams who attended a meeting designed to talk them out of honoring their contracts. Both suggested that you meet with us. Kay Edmunds scheduled a meeting in his home to discuss the project. We agreed to attend the meeting scheduled for last Saturday morning and were told later that you had called off the meeting. Ironically, later that same Saturday, you showed up with Congressman-elect Cook in an overt effort to pressure Kay Edmunds from honoring his contract to sell the land.

We recognize that you have rights to speak out about this project. However, your rights are not without limit. Your efforts to interfere with our contractual relationships and with an effort to delay our due process at South Jordan City clearly extend beyond the limits of the law. We will respect your rights but will insist that you respect our rights also. Any effort by you or anyone else to interfere with any our rights may subject each person involved to the possibility of litigation and the payment of damages. Damages literally could be in the millions of dollars.

We genuinely believe that this project will be of benefit to all the residents of South Jordan. It truly can be a win\win situation where the landowners can win, the city government can win, the residents of South Jordan can win and we as developers can win.

We are willing to answer any questions by anyone at anytime about the project. We are concerned that meetings are being held to which we are not invited to give correct information and to clear up any misunderstandings.

Please govern yourselves accordingly.

Sincerely yours,

Gerald D. Anderson
Anderson Development, L.C.

cc: Michael Mazuran, City Attorney
Dave Millheim, City Manager
Merrill Cook
Boyd Williams
Kay Edmunds
Thomas Rogan, Attorney for Patricia Forrest
Cal Robbins
Bob Schmidt

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

ANDERSON DEVELOPMENT COMPANY, L.C., a Utah limited liability company,

Plaintiff,

vs.

JANALEE S. TOBIAS, an individual, et al,

Defendants.

RULING ON MOTIONS

Civil No. 980902813

The Plaintiff has filed a motion for summary judgment on the abuse of process counterclaim. The Defendants, Mrs. Tobias and Mrs. Feld, have filed a motion for summary judgment. In addition, said Defendants have filed several motions to strike portions of affidavits filed on behalf of the Plaintiffs. The motions for summary judgment were argued to the Court on June 30, 2003, with parties and counsel being present. After oral argument the Court took the motions under advisement.

The Court, having heard oral argument and having read and considered the briefs, now rules on the motions. The Court will deal with the motions to strike portions of the affidavits first. The Court will not detail the reason for every ruling because they are too numerous. Suffice it to say that affidavits must be made on personal knowledge and set forth facts that would be admissible in evidence.

The Defendants have moved to strike portions of the second affidavit of Gerald D. Anderson. The Court finds merit in some parts of the motion. Paragraphs 9, 10, 11, 17, 18, 19, 20, 21, 25, 26, 27, 28 and 29 are ordered stricken. The last sentence in paragraph 22 is ordered stricken wherein the affiant speaks of statements never rebutted by city officials. Likewise the last two sentence in paragraph 35 are ordered stricken wherein the affiant speaks of punitive damages. In all other respects the Court finds the affidavit to be unobjectionable.

The Defendants have moved to strike portions of the second affidavit of Boyd G. Williams. The Court finds merit in some parts of the motion. Paragraphs 12, 29 and 30 are ordered stricken. In paragraph 24 the Court orders the phrase "Due to the delays encouraged by Janalee and Judy" stricken. In all other respects the Court finds the affidavit to be unobjectionable.

The Defendants have moved to strike portions of the affidavit of Cheri Johnson. The Court finds merit in some parts of the motion. Paragraph 3 is ordered stricken. The last sentence of paragraph 6 is also ordered stricken. In all other respects the Court finds the affidavit to be unobjectionable.

The Defendants have moved to strike portions of the affidavit of Thomas L. Christensen. The Court finds no merit in the motion. The affidavit is in every respect unobjectionable.

The Defendants have moved to strike portions of the affidavit of David Millheim. The Court finds merit in some parts of the motion. Paragraphs 9 and 15 are ordered stricken. In all other respects the Court finds the affidavit to be unobjectionable.

The Defendants have moved to strike portions of the affidavit of Dorothy Williams. The Court finds merit in some parts of the motion. Paragraph 2 is ordered stricken because the affiant refers to "my wife and I," although the Court believes this to be an honest mistake. The last two

sentences of paragraph 6 are ordered stricken. In all other respects the Court finds the affidavit unobjectionable.

The Plaintiff moved the Court for an award of attorneys' fees and costs in responding to the motions to strike portions of the affidavits. The Court has found many objectionable paragraphs in the affidavits and has ordered them stricken. The Court is aware, however, that most of the portions that the Defendants had asked to be found objectionable, the Court, in fact, found unobjectionable. The Court does not conclude, therefore, that the motions were made in bad faith or to harass or to delay. The motion for attorneys' fees and costs is denied.

The Court will now rule on the Defendants' Motion for Summary Judgment. The Court has previously ruled on this same matter, but it was prior to the completion of discovery. The parties have now, by and large, completed discovery and are ready for trial. The parties differ significantly as to what the facts are. Suffice it to say that this Court believes that the Plaintiff has, in the unobjectionable portions of his affidavits, set forth facts which create a cause of action sufficient to preclude summary judgment.

The three requirements that must exist for a cause of action for intentional interference with economic relations are:

1. "that the defendant intentionally interfered with the plaintiff's existing or potential economic relations";

2. "for an improper purpose or by improper means";

3. "causing injury to the plaintiff."

"No actual breach of contract is required under the tort, but only the impairment of performance."

The Defendants' motion for summary judgment is denied.

The Court will now rule on the Plaintiff's Motion for Summary Judgment over Defendants' Tobias and Feld's Abuse of Process Counterclaim.

The Court first must rule on Defendants' motion to strike parts of the affidavit of Gerald D. Anderson. The Court finds merit in some parts of the motion. The Court strikes paragraphs 16, 19 and 20. In all other respects the Court finds the affidavit to be unobjectionable.

Some months ago the Court ruled on the Plaintiff's Motion for Summary Judgment over Defendants' Tobias and Feld's Abuse of Process Counterclaim. The Court wanted the parties to have time to finish discovery before making a final ruling. Discovery is now over.

A person "may state a cause of action for abuse of process against a person who uses a legal process ... against another primarily to accomplish a purpose for which it is not designed." "A cause of action for abuse of process requires pleading and proof of two elements: (1) the use of legal process primarily to accomplish a purpose not within the scope of the proceedings for which it was not designed; and (2) malice." Bennett v. Jones, Waldo, Holbrook & McDonough, 2003 UT 9; 70 P.3d 17 (Utah, 2003)

The Court finds that the Defendants have not alleged any process in their counterclaim that was abusive. The Court has denied the Defendants' motion to dismiss the Plaintiff's claims because it found a cause of action for interference in contractual relations, together with sufficient evidence by way of affidavits to maintain that cause of action. The same cannot be said of the Defendants' counterclaim. The Court has ruled that there was no abuse in filing the action. What has the Plaintiff done since filing to abuse the process? The Court finds that it was not an abuse to take the deposition of Janalee Tobias even though the Court thinks that some of the questions lacked sensitivity. There is a further requirement for the Defendants to maintain their counterclaim and that is that they must have prevailed on their motion to dismiss the

Plaintiff's claims and they have not prevailed. The Plaintiff's Motion for Summary Judgment over Defendants Tobias and Feld's Abuse of Process Counterclaim is granted. The Defendants' Abuse of Process counterclaim is ordered dismissed.

Dated this 14th day of July, 2003.

DOUGLAS L CORNABY, Senior Judge

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Ruling on Motions was sent via U.S. Post Office, on this 14th day of July, 2003, to the following:

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Douglas L. Cornaby